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In the Supreme Court of the United States

HOUSTON BAPTIST UNIVERSITY,
EAST TEXAS BAPTIST UNIVERSITY, AND
WESTMINSTER THEOLOGICAL SEMINARY, PETITIONERS

v.

SYLVIA MATHEWS BURWELL,
SECRETARY OF HEALTH & HUMAN SERVICES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The text of the Affordable Care Act says nothing about contraceptive coverage, but it does require employers to "provide coverage" for "preventive care" for women. Despite the obvious implications for many employers of deep religious conviction, HHS interpreted that statutory mandate to require all nonexempt employers to provide at no cost the full range of FDA-approved contraceptives, including some that cause abortions, under the auspices of their plans. This Court has already considered this contraception mandate and concluded that it imposes a substantial burden on religious exercise and violates the Religious Freedom Restoration Act (RFRA). However, the government offers nonprofit religious employers such as petitioners one option for complying with the contraception mandate not available to for-profit employers—namely, executing certain forms that ensure that their employees receive the full range of contraception coverage under the auspices of the employers' healthcare plans and, in the government's view, put these religious employers in compliance with the statutory "provide coverage" obligation. It is undisputed that petitioners have a sincere religious objection to complying with the mandate in this way and that non-compliance will result in draconian fines. The question presented is:

Does the availability of a regulatory option for nonprofit religious employers to comply with HHS's contraceptive mandate eliminate either the substantial burden on religious exercise or the violation of RFRA that this Court recognized in *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751 (2014)?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 DISCLOSURE

Petitioners, who were Plaintiffs below, are Houston Baptist University, East Texas Baptist University, and Plaintiff-Intervenor Westminster Theological Seminary. No petitioner has a parent corporation. No publicly held corporation owns any portion of any of the Petitioners.

Respondents, who were Defendants below, are Sylvia Burwell in her official capacity as Secretary of the United States Department of Health and Human Services; the United States Department of Health and Human Services; Thomas E. Perez in his official capacity as Secretary of the United States Department of Labor; the United States Department of Labor; Jacob J. Lew, in his official capacity as Secretary of the United States Department of the Treasury; and the United States Department of the Treasury.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners are two religious colleges and a theological seminary that provide generous healthcare plans to their employees. Those plans include free access to fourteen different kinds of contraceptives. But those plans exclude four types of contraceptives that petitioners believe constitute abortifacients. No one doubts the sincerity of petitioners' religious beliefs. Nonetheless, the Department of Health and Human Services believes that petitioners' employees must have free access to those four contraceptives under the auspices of petitioners' plans in order for petitioners to comply with the Affordable Care Act and the agency's contraceptive mandate and to avoid draconian penalties.

This Court addressed a nearly identical dynamic in upholding the religious exercise claim of two for-profit companies in *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751 (2014). Although the underlying contraception mandate and the penalties for non-compliance are identical here, there is one potentially salient difference when it comes to nonprofit religious employers: The agencies offer religious nonprofits an option for complying with the contraception mandate that is not available to for-profit companies. Under this so-called "accommodation," nonprofit religious employers may comply with the contraception mandate by executing certain forms. Those forms have important legal and practical consequences. As a legal matter, they suffice to allow the government to deem the nonprofit religious employers and their plans in compliance with their statutory obligation to "provide coverage," which as a regulatory matter must include the full range of FDA-approved contra-

ceptives. The forms also allow the government to conclude that the benefits are being provided under the operation of the nonprofit religious employers' own plans. And, as a practical matter, the requisite forms are sufficient to ensure that employees of the nonprofit religious employers, in fact, will be able to receive the full range of FDA-approved contraceptives in connection with their employers' healthcare plans.

Because this regulatory option for complying with the contraception mandate has the same legal and practical consequences as complying with the mandate directly, it is not surprising that numerous religious employers find it no more compatible with their religious beliefs. They sincerely believe that fulfilling the contraceptive mandate via this regulatory option facilitates the provision of contraceptives and abortifacients and makes them complicit in actions that violate their religious beliefs. No one, it bears repeating, questions the sincerity of those religious beliefs. And a long line of this Court's cases, including but by no means limited to *Hobby Lobby*, make clear beyond cavil that courts are not free to second-guess the sincerity of those religious beliefs by suggesting that the degree of involvement deemed sufficient by the government is insufficient to violate religious scruples. Thus, especially after *Hobby Lobby*, there should be no doubt that the contraceptive mandate imposes a substantial burden on petitioners' religious exercise. The contraceptive mandate and the penalties for noncompliance are identical, and petitioners sincerely believe that the regulatory option for complying with the mandate violates their religion. That should be the end of the substantial burden inquiry.

Remarkably, however, the court of appeals here (like other circuits) concluded that there is no substantial burden on religious exercise. It did so only by yielding to the temptation to conclude that the degree of complicity demanded by the government was insufficient to constitute a substantial burden. That conclusion plainly conflicts with *Hobby Lobby* and this Court's other decisions forbidding courts from engaging in any such inquiry.

That would be reason enough for this Court's plenary review, but a number of additional considerations strongly support this Court's review at this juncture. This Court has already had to use its extraordinary authority under the All Writs Act in three different cases involving challenges to the contraception mandate by nonprofit religious employers. The felt need for that extraordinary intervention not only underscores the extraordinary importance of this issue, but also makes clear that deferring review will produce not orderly percolation, but the need for further extraordinary intervention by this Court. What is more, petitioners here are at the end of the line with respect to their RFRA claims. Unlike cases that arise in a preliminary injunction posture, petitioners prevailed on summary judgment only to have the court of appeals conclude they could not even show a substantial burden. That reasoning is plainly inconsistent with this Court's precedents. It is inevitable that this Court will need to address this issue on the merits. It should do so in time to ensure that petitioners' rights to religious exercise are not sacrificed to a fundamentally misguided decision about what constitutes a substantial burden and what con-

stitutes the proper role for an Article III court in evaluating sincere religious beliefs.

OPINIONS BELOW

The opinion of the district court is reported at 988 F. Supp. 2d 743. App.31a. The opinion of the Fifth Circuit is reported at --- F.3d ---, 2015 WL 3852811. App.1a.

JURISDICTION

The judgment of the Fifth Circuit was entered on June 22, 2015. App.1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in relevant part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * * ." U.S. Const. amend. I. The relevant statutory and regulatory provisions are in Appendix D (App.89a).

STATEMENT

The Contraceptive Mandate

The Affordable Care Act mandates that any "group health plan" must "provide coverage" for certain "preventive care" for women without "any cost sharing." 42 U.S.C. § 300gg-13(a), (a)(4). Congress itself did not define "preventive care" but instead allowed HHS to do so. 42 U.S.C. § 300gg-13(a)(4). HHS in turn outsourced that task to the Institute of Medicine, a private organization. *Hobby Lobby*, 134 S.Ct. at 2762. The Institute's definition, which HHS adopt-

ed wholesale, includes all FDA-approved contraceptive methods and sterilization procedures, including four methods that can prevent the implementation of a fertilized egg: Plan B (the "morning-after" pill), Ella (the "week-after" pill), and two types of intrauterine devices (IUDs). *Id.* at 2762-63. Failure to "provide coverage" for all FDA-approved methods and procedures triggers severe penalties. See, *e.g.*, 26 U.S.C. § 4980D ($100 per day per affected individual); 26 U.S.C. § 4980H ($2000 per year per full-time employee).

The mandate to cover all FDA-approved forms of contraception is not universal; instead, it is subject to both statutory and regulatory exemptions. First, as a statutory matter, employers with "grandfathered" healthcare plans—plans that existed before March 30, 2010, and have not made certain changes after that date—need not comply with the "provide coverage" mandate at all. See 42 U.S.C. § 18011; *Hobby Lobby*, 134 S.Ct. at 2764. Although these plans cover tens of millions of individuals and must comply with a subset of ACA reforms that "HHS has described as 'particularly significant protections,'" the statutory mandate to cover preventative care, which has been administratively interpreted to mandate contraceptive coverage, "is expressly excluded from this subset." *Id.* at 2780 (quoting 75 Fed. Reg. 34540 (June 17, 2010)); see also 42 U.S.C. § 18011(a)(4). That exclusion exists "simply [to serve] the interest of employers in avoiding the inconvenience of amending an existing plan." *Hobby Lobby*, 134 S.Ct. at 2764. Although HHS has suggested that it intends to phase grandfathered plans out over time, it has not actually done so; instead, "[g]randfathered plans may remain

so indefinitely." *Hobby Lobby* v. *Sebelius*, 723 F.3d 1114, 1124 (10th Cir. 2013) (en banc).

Second, the statute provides that employers with fewer than fifty employees are not required to offer insurance at all. See 26 U.S.C. § 4980H(c)(2)(A); 26 U.S.C. § 4980D(d). Accordingly, these small employers—who collectively employ an estimated 34 million Americans—can avoid the contraceptive mandate by declining to offer their employees insurance. *Hobby Lobby*, 134 S.Ct. at 2764.

Third, after an initial outcry, HHS recognized that its contraceptive mandate implicated sincere religious objections and thus created a regulatory exemption for certain "religious employers." 78 Fed. Reg. 39870, 39874 (July 2, 2013); 45 C.F.R. 147.131(a). This exemption is available to tens of thousands of churches and associations of churches, as well as to "integrated auxiliaries" of churches—a category defined by how closely an organization is affiliated with or controlled by a church. 26 C.F.R. 1.6033-2(h). A "religious employer" need not do anything to avail itself of this exemption; it need not certify its religious beliefs, execute or deliver any forms, provide notice to HHS or any other government authority, or do anything that would result in its employees receiving contraceptive coverage in connection with its healthcare plan.

Nonprofit Religious Organizations and the Mandate

Although HHS was well aware that religious objections to the contraceptive mandate were by no means limited to houses of worship, their associa-

tions, or their "integrated auxiliaries," it nonetheless refused to exempt other nonprofit religious organizations from the statutory requirement to provide preventative coverage, which by regulation extends to providing all FDA-approved contraceptives free of cost.[1] Accordingly, countless religious colleges and seminaries, faith-based charities, orders of nuns, and other religious organizations remain subject to the contraceptive mandate. Instead of exempting these nonprofit employers, HHS offered them an additional means, unavailable to objecting for-profit employers, through which they can "comply" with the mandate to provide contraceptive coverage. 78 Fed. Reg. at 39879 ("an eligible organization is considered to comply with section 2713 of the PHS Act"). To be clear, this so-called "accommodation" is a means by which the nonprofit can fulfill its statutory obligation to provide coverage, not an exemption from that obligation.

More specifically, this regulatory option requires a nonexempt religious employer to "self-certify" that it is a religious employer and has religious objections to providing some or all FDA-approved contraceptive methods. 26 C.F.R. 54.9815-2713AT(b)(ii)(A), (c)(1). By doing so, the employer triggers a regulation that

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[1] The government's criterion for distinguishing between government-recognized "religious employers" and merely "eligible organizations" like petitioners is based entirely on its assumption that houses of worship "are more likely than other employers to employ people of the same faith who share the same objection." 78 Fed. Reg. 39870, 39874 (July 2, 2013).

requires either its insurer or, in the case of a self-insured employer (which many religious employers are), its third party administrator ("TPA") to make "separate payments for contraceptive services directly for plan participants and beneficiaries." 78 Fed. Reg. at 39876; see 26 C.F.R. 54.9815–2713AT(b)(2), (c)(2). In other words, unlike the exemption provided to grandfathered plans and religious employers, the "accommodation" does not excuse the employer from ensuring that participants in its plan receive contraceptive coverage in connection with that plan. It instead provides a regulatory mechanism that enables the employer to satisfy both the statutory obligation to provide preventative care and the regulatory obligation to provide contraception coverage, and thereby "assur[e] that participants and beneficiaries covered under such organizations' plans receive contraceptive coverage." 77 Fed. Reg. 16501, 16503 (Mar. 21, 2012).

Originally, objecting nonprofits had only one option for "self-certifying": executing and delivering to its insurer or TPA Employment Benefits Security Administration ("EBSA") Form 700. App.140a. The execution of this document is critical not only to discharging the employer's statutory/regulatory obligation, but also to the actual provision of the objected-to coverage. As the form states on its face, upon execution and delivery, it becomes "an instrument under which the plan is operated." *Ibid.* In particular, it designates the TPA as "plan administrator and claims administrator," not generally, but "solely for the purpose of providing payments for contraceptive services for participants and beneficiaries." 78 Fed. Reg. at 39879; 29 C.F.R. 2510.3–16(b), (c).

That designation is essential because without it, a TPA would have no contractual authority to pay *any* claims (let alone claims for contraceptive coverage excluded from the employer's plan), as a self-insured employer pays claims itself. And under ERISA, self-funded plans can be modified only by a written document. 29 U.S.C. § 1102(a)(1). Accordingly, execution of Form 700 is necessary not only to trigger the regulatory obligation of the TPA to provide contraceptive coverage to the religious organization's employees, but also to "ensure[] that there is a party with legal authority"—both as a contractual matter and for purposes of ERISA liability—to make payments to plan beneficiaries for contraceptive services. 78 Fed. Reg. at 39879. Only if an employer executes an instrument that amends its plan in that manner does a TPA become both obligated and authorized to provide the objected-to coverage, and eligible for 115% reimbursement for the costs of doing so. See 45 C.F.R. 156.50(d)(1)-(3).

The "Augmented" Regulatory Option for Compliance with the Contraceptive Mandate

Unsurprisingly, religious organizations found little solace in a so-called "accommodation" that continues to require them to satisfy their statutory/regulatory obligation to provide the objected-to contraceptive coverage, but allows them to do so by effectively amending their own plans to authorize their own issuers or administrators to provide that coverage, and simply excuses them only from paying for the coverage directly. After all, these organizations do not merely object to paying for or being the direct provider of contraceptive coverage; they object

to taking actions that make them complicit in, or facilitate, access to abortifacients. Filing a form that the government itself deems sufficient to treat the religious employers as providing the coverage required by the statute and regulations certainly supplies a reasonable basis for religious employers to believe that they are at least facilitating the coverage to which they object. Accordingly, several nonprofit religious organizations (including petitioners) brought lawsuits challenging the contraception mandate as applied to nonprofit religious organizations as, among other things, a violation of the Religious Freedom Restoration Act.

When one of those lawsuits reached this Court in the form of an application for an injunction pending appeal, the Court responded by issuing a rare injunction under the All Writs Act excusing the employers from executing Form 700 and instead ordering:

> If the employer applicants inform the Secretary of Health and Human Services in writing that they are non-profit organizations that hold themselves out as religious and have religious objections to providing coverage for contraceptive services, the respondents are enjoined from enforcing against the applicants the challenged provisions of the [ACA] and related regulations pending final disposition of the[ir] appeal.

Little Sisters of the Poor Home for the Aged v. *Sebelius*, 134 S.Ct. 1022 (2014). Because the applicants in that case were self-insured through a church plan, this relief not only prevented them from being forced to execute Form 700, but also has the practical effect

of ensuring that their TPAs would have no legal authority to begin providing the objected-to coverage until their legal challenges were resolved. The Court then proceeded to order extraordinary injunctive relief in *Wheaton College* v. *Burwell*, 134 S.Ct. 2806 (2014).

HHS responded to these orders by revising its regulation in form but not substance, and continuing to require objecting nonprofits to file forms that HHS deems sufficient to put them in compliance with the statutory/regulatory obligation to provide the objected-to contraceptives. Specifically, HHS "augmented" the regulation by allowing an objecting employer to notify HHS of its religious objections instead of executing and delivering Form 700 to its insurer or TPA. Just as with Form 700, however, this notification avenue does not exempt the nonprofit from the contraceptive mandate. Nor does it consist solely of informing HHS of a religious objection. Instead, like Form 700, it serves as "an instrument under which the plan is operated." App.143a.

To that end, the notice must inform HHS of the name and type of the employer's health plan, as well as "the name and contact information for any of the plan's [TPAs]." 79 Fed. Reg. 51092, 51094-95 (Aug. 27, 2014). "If" the religious organization submits this "necessary" information, the government "will send a separate notification to" its insurer or TPA informing of its new "obligations" to provide contraceptive coverage to participants in the organization's plan and its designation as a plan and claims administrator for that purpose only. *Id.* at 51095; 29 C.F.R. 2510.3-16(b). And if the employer takes these steps, it will

ensure that its employees receive no-cost access to the full range of FDA-approved contraceptives under the auspices of its plan, and HHS will deem the employer in compliance with its statutory/regulatory obligation to do just that.

In sum, then, whether an employer executes Form 700 or provides notice to HHS, "[t]he result is the same." App.8a. The religious organization is deemed to comply with the requirement to provide coverage for abortifacients to which it objects; its own healthcare plan becomes the vehicle for facilitating that coverage; and its own certification or notice serves as the legal "instrument" that triggers and authorizes provision of that coverage. Only by taking the affirmative act of executing a legal "instrument" that puts itself in that position can a religious organization avoid massive financial penalties for excluding any FDA-approved forms of contraception from its healthcare plan.

Proceedings Below

1. Petitioners are three nonprofit religious organizations that object to providing certain forms of FDA-approved contraception on religious grounds.

Houston Baptist University ("HBU") and East Texas Baptist University ("ETBU") are Christian liberal arts universities affiliated with the Baptist General Convention of Texas. Dist. Ct. Doc. No. 70-2, Sloan Decl. 2; Dist. Ct. Doc. No. 70-1, Oliver Decl. 2. Their Christian faith permeates everything they do. Both schools are governed by trustees who must, by law, share the schools' understanding of the Christian faith. Sloan Decl. 2-3; Oliver Decl. 3. Both

schools hire only faculty and staff who likewise share their faith. Sloan Decl. 2-3; Oliver Decl. 3; 42 U.S.C. § 2000e-1(a). And while they admit students of all faiths or none, both schools ask their students to live according to a set of Christian principles while enrolled. Sloan Decl. 3; Oliver Decl. 3.

One of those principles is respect for human life. The schools hold traditional Christian beliefs about the sanctity of human life from conception to natural death. Sloan Dec. 3-5; Oliver Decl. 4-6. ETBU's student handbook tells students that the school "supports a culture of life" and seeks to support not only unborn children but also parents facing a crisis pregnancy. Oliver Decl. 5. HBU's Student Code states that the school "cannot support actions which encourage or result in the termination of human life through suicide, euthanasia, or abortion-on-demand," but that "the campus community is prepared to stand with both the father and mother of the unborn child" and help them deal with the unplanned pregnancy in a way that is "supportive and redemptive." Sloan Decl. 4. The schools expect all their faculty to affirm and teach these beliefs, and they expect all their students to live in a way that reflects these beliefs while enrolled. Sloan Decl. 3-4; Oliver Decl. 3, 5.

Westminster Theological Seminary is a nondenominational graduate school in the Presbyterian tradition. Dist. Ct. Doc. No. 75-2, Jue Decl. 2. Westminster's entire curriculum is biblical and theological, and it exists to train adults for Christian ministry. Jue Decl. 2-4. Consistent with this mission, Westminster is governed by trustees, all of whom must be elders in a Presbyterian church. Jue Decl. 3.

All of its faculty and staff must be practicing Christians, and all faculty must assent to the Westminster Larger Catechism, which exhorts Westminster's community to "protect[] and defend[] the innocent," including unborn children. Jue Decl. 4-5. Westminster serves 625 graduate students who have come from around the world to learn about Westminster's Presbyterian faith. Jue Decl. 3-4. For historical and theological reasons, Westminster is independent of any one church or denomination. Dist. Ct. Doc. No. 95-1, Supp. Jue Decl. 1-2.[2]

All three petitioners provide their employees with healthcare plans that reflect their religious commitment to the sanctity of life and the well-being of their campus communities. ETBU is both the sponsor and administrator of its own self-insured plan. Oliver Decl. 7. HBU provides an ERISA-exempt self-insured church plan through GuideStone, which is operated by the Southern Baptist Convention.[3] Sloan Decl. 6.

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[2] Because Westminster is not "operated, supervised, or controlled by" a particular church it does not qualify as an "integrated auxiliary" under a special IRS rule for seminaries. 26 C.F.R. 1.6033-2(h)(5).

[3] A "church plan" is a benefit plan established by a church or association of churches for its employees and employees of organizations that share "common religious bonds and convictions." See 29 U.S.C. § 1002(33). Unless they choose otherwise, church plans are exempt from regulation under ERISA. 29 U.S.C. § 1003(b)(2). Although church plans are a form of self-insurance, "self-insured plan" refers here to a self-insured plan that is not a church plan.

Westminster had an insured plan through Independent Blue Cross of Pennsylvania, but switched to GuideStone during the course of this lawsuit. Jue Decl. 7; Westminster C.A. Br. at 15. None of these plans is grandfathered. Because of the schools' religious commitment to the sanctity of life, their plans do not cover surgical abortions or the drugs and devices at issue here. Sloan Decl. 7; Oliver Decl. 7; see Westminster C.A. Br. 15. But all three schools provide no-cost coverage for all other preventive services required under the ACA, including all other FDA-approved contraceptives. *Ibid.*

Petitioners want to continue to offer generous, conscience-compliant health benefits to their employees, but because of the contraceptive mandate, they cannot. Under the contraception mandate, providing the vast majority of FDA-approved contraceptives is not enough. An employer must take steps to make all FDA-approved contraceptives, including those petitioners object to as abortifacients, available to those who obtain healthcare under the plan. As nonprofits, petitioners have an option not available to objecting for-profit corporations, but petitioners view that option (in both its original and "augmented" form) as facilitating access to abortifacients in violation of their religious beliefs. And the government, for its part, views that option as fulfilling petitioners' statutory/regulatory obligation to provide preventative care/contraceptive coverage.

GuideStone is currently a plaintiff in a separate mandate challenge. See *Burwell* v. *Reaching Souls Int'l, Inc.*, No. 14-6028 (10th Cir. argued Dec. 8, 2014).

Although petitioners sincerely believe that this regulatory option for fulfilling the contraceptive mandate is inconsistent with their religious beliefs, their only options are to compromise those beliefs or pay enormous fines. Indeed, since the underlying contraception mandate is the same one that was before this Court in *Hobby Lobby*, the prohibitive fines for non-compliance are also the same. If petitioners fail to comply with the contraceptive mandate, they could face as much as $23.1 million in annual fines, along with potential penalties and lawsuits. Sloan Decl. 13; Oliver Decl. 13-14; Jue Decl. 12.

2. To avoid being put to the impermissible choice of violating their religious beliefs or violating the law, the Universities filed suit on October 9, 2012. Westminster intervened in March 2013. After a lengthy stay to allow the government to change the mandate regulations, the parties filed cross motions for summary judgment. In December 2013, the district court granted petitioners permanent injunctive relief on their RFRA claim. In doing so, Judge Rosenthal rejected the government's argument that complying with the contraception mandate via the regulatory option imposes no burden on petitioners' exercise of religion because, "once the self-certification is completed, the plaintiffs' involvement ends." App.78a. As she instead recognized, it is the very act of self-certifying—"an affirmative act" that petitioners must undertake to achieve compliance with the contraceptive mandate—"that they find * * * to be religiously offensive." App.76a.

Although Judge Rosenthal correctly concluded that "the court cannot second-guess" this "sincerely

held religious belief," App.74a, she also recognized and explained its source: By self-certifying, petitioners ensure that their "employees can obtain [the objectionable] coverage and payment only as long as they are the plaintiffs' employees and on the plaintiffs' group health plan." App.80a. And the government's system relies on "the insurance plan that the religious-organization employer put into place, the issuer or TPA the employer contracted with, and the self-certification form the employer completes and provides the issuer or TPA, that enable the employees to obtain the free access to the contraceptive devices that the plaintiffs find religiously offensive." *Ibid.* It is in these respects that the "affirmative act" of self-certification (or notice) forces petitioners to facilitate contraceptive coverage in violation of their sincerely held religious beliefs. And by forcing religious objectors to perform that "affirmative act" or face millions of dollars in fines, the government has imposed a substantial burden on petitioners' exercise of their religious beliefs. See App.81.

Having concluded as much, Judge Rosenthal turned to whether the regulatory option available to nonprofits is "the least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. § 2000bb–1(b). Finding that the government could achieve the same end by, among other things, "provid[ing] the contraceptive services or coverage directly to those who want them but cannot get them from their religious-organization employers," she concluded that it is not. App.84a.

3. The government appealed, and the Fifth Circuit reversed.[4] According to the Fifth Circuit, even though there is no dispute that petitioners sincerely believe that complying with the contraceptive mandate via the regulatory option would violate their religious beliefs, and even though there is no dispute that petitioners would face enormous fines if they refuse to do so, the requirement to comply nonetheless imposes no "substantial burden" on petitioners' exercise of religion. App.18a. The court reached that conclusion by reasoning that petitioners are simply wrong to believe that the regulatory option for complying with the contraceptive mandate forces them to "facilitat[e] access to contraceptives." App.18a-23a. Accordingly, the court never reached the question of whether that option is the least restrictive means of achieving a compelling government interest.

REASONS FOR GRANTING THE PETITION

I. This case presents an exceptionally important question.

This case presents a question of profound and nationwide importance. There is no dispute that thousands of religious organizations throughout the country sincerely believe that complying with the mandate that they provide healthcare coverage that includes abortifacients and contraceptives, either di-

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[4] The Fifth Circuit consolidated petitioners' appeals with three other government appeals of district court decisions holding the "accommodation" inconsistent with RFRA; the plaintiffs in those appeals are not parties to this petition. App.3a.

rectly or via the "accommodation" HHS has offered them, violates their religious beliefs. And there is no dispute that unless these religious employers comply with that mandate, they will face massive financial penalties. In short, there is no dispute that employers ranging from religious schools to faith-based charities to orders of nuns are being forced to choose between violating their sincere religious beliefs or violating federal law.

Understandably, this unprecedented situation has generated a nearly unprecedented volume of litigation. Indeed, hundreds of religious institutions representing a wide cross-section of organizations and faiths have brought lawsuits, some on behalf of entire classes of affected religious employers, seeking relief from the untenable position in which HHS has put them.[5] None of this should be surprising. Traditionally, the government has steered clear of mandating coverage as religiously sensitive as contraception and abortifacients, and has provided generous conscience clauses when mandates threaten to intrude upon religious beliefs. As a result, religious organizations were free to decide for themselves how to provide their employees with healthcare plans that comply with their religious beliefs.

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[5] See Becket Fund for Religious Liberty, *HHS Mandate Information Central*, http://www.becketfund.org/hhsinformationcentral/; National Women's Law Center, *Status of the Lawsuits Challenging the Affordable Care Act's Birth Control Coverage Benefit*, http://www.nwlc.org/sites/default/files/pdfs/contraceptive_coverage_litigation_status_6-24-15_finalv2.pdf.

The promulgation of a regulatory mandate that a wide swath of employers including religious orders and colleges must provide healthcare coverage that includes contraception and abortifacients changed all that. Religious employers made it perfectly clear to HHS that compliance with this unprecedented regulatory mandate would violate their sincerely held beliefs. Yet HHS nonetheless refused to exempt them, even though thousands of other employers have been exempted for reasons ranging from religious conscience to administrative convenience. Instead, HHS offered only an alternative avenue for those employers to *comply* with the mandate to provide the coverage that HHS desires and that the employers' religions forbid. Religious employers once again made perfectly clear that providing such coverage, whether directly or via this so-called "accommodation," would violate their religious principles. It thus should not come as a surprise that HHS's unprecedented mandate generated unprecedented litigation seeking to vindicate the free exercise of religion.

Many of these lawsuits, including this one, met with success in the district courts and the government appealed. But in contrast to the district courts that found a RFRA violation based on a straightforward application of *Hobby Lobby*, the Third, Fifth, Seventh, and D.C. Circuits concluded that forcing religious employers to comply with the contraception mandate via the nonprofit regulatory option does not violate RFRA. And to make matters worse, they have done so by employing a form of substantial burden analysis that is virtually identical to the reasoning that this Court squarely rejected in *Hobby Lobby* and a long line of cases before it. See *infra* Part II. Those

circuit decisions are profoundly flawed, but what matters at this juncture is not who is correct about the ultimate merits of this important and recurring nationwide controversy. Instead, what matters now is that, as a consequence of final decisions like the one below, religious employers throughout the nation face the imminent prospect of being forced to choose between taking an action that they sincerely believe will violate their religious beliefs or violating the ACA.

That is reason enough for this Court to intervene now, rather than allowing this exceptionally important question to "percolate" while employers face the abandonment of the free exercise rights that RFRA guarantees. Indeed, this Court has already recognized—repeatedly—that this extraordinary situation demands extraordinary action. Three times, the Court has been asked to provide extraordinary relief under the All Writs Act to prevent an employer from being forced to comply with contraceptive mandate through HHS's "accommodation" before exhausting all avenues of judicial review. And three times, this Court has complied, first by granting an injunction pending appeal in *Little Sisters*, then by doing the same in *Wheaton College*, and most recently by granting an injunction pending resolution of a petition for certiorari challenging HHS's "augmented" "accommodation" in *Zubik* v. *Burwell*, 576 U.S. ---, 2015 WL 3947586 (June 29, 2015). As the Court has thus recognized, the stakes are simply too high to allow the government to begin enforcing its novel regu-

latory scheme before the legality of that scheme has been fully and finally litigated.[6]

And as this case confirms, the time for this Court to play its essential role in that process is now. The arguments for each side have been exhaustively briefed, and petitioners' RFRA claims have been finally resolved by the courts below, with the District Court granting them a permanent injunction and the Fifth Circuit reversing. Accordingly, unless petitioners receive relief from this Court, they are out of options; they will be forced to choose between compliance with the contraceptive mandate via one of the avenues HHS has offered or compliance with their religious beliefs. And that situation is not unique to petitioners; several religious organizations have now litigated their claims to final judgment without receiving relief from the courts of appeals. Unless this Court intervenes now, a decision on the merits will come too late to save these organizations from making the very choice that RFRA is supposed to protect them from in all but the narrowest of circumstances. This Court should not let that extraordinary result come to pass without deciding for itself whether HHS's unprecedented effort to force religious organi-

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[6] This Court has also twice granted, vacated, and remanded pre-*Hobby Lobby* decisions rejecting challenges to the nonprofit regulation, indicating a "reasonable probability that th[ose] decision[s] * * * rest[] upon a premise" that should be "reject[ed]" in light of subsequent authority, *Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996). See *Univ. of Notre Dame* v. *Burwell*, 135 S.Ct. 1528 (2015); *Michigan Catholic Conference* v. *Burwell*, 135 S.Ct. 1914 (2015).

zations to take actions that HHS itself considers sufficient to comply with a mandate to provide contraceptive coverage that they find objectionable on religious grounds can be reconciled with Congress' stringent protection of the free exercise of religion.

II. The court of appeals' failure to find a substantial burden on religious exercise is exceptionally wrong.

This Court's immediate intervention is all the more essential because the decision below is profoundly wrong. Indeed, the reasoning the Fifth Circuit employed in concluding that the government has not imposed a substantial burden on petitioners' exercise of religion is impossible to reconcile with the reasoning this Court employed in *Hobby Lobby* and decades of substantial burden cases before it.

As noted, there is no dispute that petitioners sincerely believe that complying with the contraceptive mandate via the regulatory option requires them to facilitate access to contraceptive coverage in violation of their religious beliefs. And there is no dispute that failure to comply with the contraceptive mandate through one of the avenues HHS has offered will result in massive financial penalties. As the District Court correctly recognized, that should have been the end of the substantial burden analysis, as forcing petitioners to choose between taking an action that they sincerely believe would violate their religion or "pay[ing] an enormous sum of money" "clearly imposes a substantial burden on" their exercise of religion. *Hobby Lobby*, 134 S.Ct. at 2779. That is so whether or not courts *agree* with petitioners that the action in question would violate their religious beliefs, as

courts simply do not have the authority to "second-guess" a sincerely held religious belief. App.74a.

Yet that is precisely what the Fifth Circuit did in concluding that the government has not imposed a substantial burden on petitioners' exercise of religion. The court did not dispute that petitioners sincerely believe that each of the avenues through which HHS allows them to comply with the contraceptive mandate would force them to facilitate contraceptive coverage in violation of their religious beliefs, or that the consequences of non-compliance—namely, massive penalties—are "draconian." App.5a. Instead, the court of appeals insisted that the substantial burden analysis turns not on whether petitioners are being pressured to *comply* with a law that they find objectionable on religious grounds, but rather on whether petitioners are correct in their belief that by being pressured to comply with that law, they are really being "pressured * * * to facilitate the use of contraceptives." App.17a. The court rejected petitioners' RFRA claims by reasoning that petitioners are simply wrong to believe that "the acts *they* are required to perform" under the regulatory option are tantamount to "providing or facilitating access to contraceptives." App.18a.

That reasoning is impossible to reconcile with this Court's substantial burden jurisprudence. This Court admonished decades ago that "it is not within the judicial function and judicial competence to inquire whether" someone who sincerely objects to a law on religious grounds has "correctly perceived the commands of [his] faith." *Thomas* v. *Review Board*, 450 U.S. 707, 716 (1981). After all, "[c]ourts are not arbi-

ters of scriptural interpretation," and they are "singularly ill equipped" to make sensitive decisions about what does or does not interfere with religious beliefs—*e.g.*, whether the degree of complicity required is religiously problematic. *Ibid.* Instead, the only questions for the courts to resolve in the substantial burden analysis are whether a religious belief is sincerely held and, if so, whether the "pressure" the government has "put[] * * * on an adherent to modify his behavior and to violate his beliefs" is "substantial." *Id.* at 718; see also *United States* v. *Lee*, 455 U.S. 252, 257 (1982).

To the extent there was any doubt on that score, *Hobby Lobby* eliminated it. Just as in this case, "HHS's main argument" concerning the substantial burden inquiry in *Hobby Lobby* "[wa]s basically that the connection between what the objecting parties must do * * * and the end that they find to be morally objectionable * * * [wa]s simply too attenuated." 134 S.Ct. at 2777. Rather than resolve that argument as part of its substantial burden analysis, the Court made clear that it was entirely misplaced, as it "addresses a very different question that the federal courts have no business addressing," and that the Court itself has "repeatedly refused" to answer. *Id.* at 2778 (collecting cases). The "difficult and important question" of whether "the line" someone draws in determining what actions are "consistent with his religious beliefs"—including how much facilitation or complicity is too much—is instead a line for the religious adherent alone to draw. *Ibid.* The only questions the Court found relevant to its substantial burden analysis were whether "the line drawn" by the challengers "reflect[ed] an honest conviction" and, if

so, whether the government had substantially pressured them to cross that line. *Ibid.* And as the Court went on to conclude, putting employers to the choice of crossing that line or "pay[ing] an enormous sum of money" unquestionably does substantially pressure them to cross that line. *Id.* at 2779.

As several judges—including Judge Rosenthal below—have recognized, that same reasoning compels the conclusion that the nonprofit regulation imposes a substantial burden on religious exercise. As Judge Pryor has explained, "[s]o long as the [religious organization's] belief is sincerely held and undisputed—as it is here—we have no choice but to decide that compelling the participation of the [religious organization] is a substantial burden on its religious exercise." *Eternal Word Television Network, Inc.* v. *Sec'y, Dep't of Health & Human Servs.*, 756 F.3d 1339, 1348 (11th Cir. 2014) (Pryor, J., specially concurring). Judges Kavanaugh and Brown likewise recently emphasized the "bedrock principle" of *Thomas* and *Hobby Lobby* "that we may not question the wisdom or reasonableness (as opposed to the sincerity) of plaintiffs' religious beliefs—including about complicity in wrongdoing." *Priests for Life* v. *U.S. Dep't of Health & Human Servs.*, No. 13-5368, slip op. 10 (D.C. Cir. May 20, 2015) (Kavanaugh, J., dissenting from denial of rehearing en banc); see also *id.* at 6-7 (Brown, J., dissenting from denial of rehearing en banc). And as Judge Flaum aptly put it, whether the regulatory option available to nonprofits forces them to facilitate access to contraceptive coverage "is not a question of legal causation but of religious faith. Notre Dame tells us that Catholic doctrine prohibits the action that the government requires it to take. So

long as that belief is sincerely held, I believe we should defer to Notre Dame's understanding." *Univ. of Notre Dame* v. *Sebelius*, 743 F.3d 547, 566 (7th Cir. 2014) (Flaum, J., dissenting), vacated and remanded, 135 S.Ct. 1528 (2015).

Unfortunately, when it comes to challenges to the contraceptive mandate by nonprofit religious employers, adherence to the clear teachings of *Hobby Lobby* and *Thomas* has become a feature more common to dissenting opinions than majorities. Indeed, each of the four courts of appeals that have resolved such challenges (including the Fifth Circuit here) has employed a substantial burden analysis more reminiscent of the approach advanced by the dissenters in *Hobby Lobby*. See *Hobby Lobby*, 134 S.Ct. at 2799 (Ginsburg, J., dissenting) (finding no substantial burden because there were "independent decisionmakers * * * standing between the challenged government action and the religious exercise claimed to be infringed").

For instance, in *Geneva College* v. *Secretary of United States Department of Health & Human Services*, 778 F.3d 422 (3d Cir. 2015), the Third Circuit first erroneously concluded that RFRA requires courts to "objectively assess whether the appellees' compliance with the self-certification procedure does, in fact * * * make them complicit" in facilitating religion, then drew its own conclusion that the procedure does not. *Id.* at 435. Likewise, the Seventh Circuit has adamantly insisted both that it "is for the courts to determine whether the law actually forces [employers] to act in a way that would violate [their] beliefs," *Univ. of Notre Dame* v. *Burwell*, 786 F.3d 606,

611-12 (7th Cir. 2015) (Posner, J.) *("Notre Dame II")*, and that religious employers are wrong to believe that it does, see *Wheaton College* v. *Burwell*, --- F.3d --, No. 14-2396, 2015 WL 3988356, at *7 (7th Cir. 2015) (Posner, J.) ("No one is asking Wheaton to violate its religious beliefs."). And the D.C. Circuit dismissed the employers' RFRA objections by reasoning that the nonprofit regulation requires them to do nothing more than complete "a bit of paperwork" that "wash[es] their hands of any involvement in providing insurance coverage for contraceptive services." *PFL*, 772 F.3d 229, 237, 247 (D.C. Cir. 2014).

Like the decision below, those cases simply cannot be reconciled with this Court's repeated admonishment that "it is not within 'the judicial function and judicial competence'" to decide whether a religious adherent has "correctly perceived the commands of [his] faith." *Lee*, 455 U.S. at 257 (quoting *Thomas*, 450 U.S. at 716). Indeed, just this past Term, applying RLUIPA's identical substantial burden test, this Court found it sufficient that an inmate demonstrated that he would "face serious disciplinary action" if forced to shave a beard that he sincerely believed his religion required him to maintain. *Holt* v. *Hobbs*, 135 S.Ct. 853, 862 (2015). In doing so, the Court spent no time evaluating whether maintaining a half-inch beard was really necessary or sufficient to comply with a "dictate of [petitioner's] religious faith." *Ibid.* Nor did it focus on the fact that shaving takes only a few minutes. Instead, it was enough that petitioner's belief was sincere, and that the government had placed substantial pressure on him to violate it.

So, too, here. Thousands of religious employers throughout the nation sincerely believe that complying with the nonprofit regulations involves a degree of facilitation or complicity that would violate their religious beliefs, and there is no question that the consequences of declining to pursue the "accommodation" route for fulfilling the contraceptive mandate are "draconian." App.5a. Indeed, the ultimate regulatory mandate at issue here—the contraceptive mandate—is the exact same one that was at issue in *Hobby Lobby*, and the fines for noncompliance are identical as well. The only difference is that HHS has given petitioners an option for fulfilling the mandate that was not offered to for-profit corporations like Hobby Lobby.

But as long as the proffered means of fulfilling the contraceptive mandate violate sincerely held religious beliefs, then the existence of a substantial burden follows ineluctably from *Hobby Lobby*. Just as in *Hobby Lobby*, the government has "demand[ed] that [employers] engage in conduct that seriously violates their religious belief[s]" on pain of "substantial economic consequences." *Hobby Lobby*, 134 S.Ct. at 2776. And just as in *Hobby Lobby*, that economic pressure "clearly imposes a substantial burden on those beliefs." *Id.* at 2779. In fact, the substantial economic consequences are exactly the same, because the ultimate mandate is exactly the same. Perhaps courts could conclude that the existence of additional regulatory means of compliance with the contraceptive mandate alters the least restrictive means analysis. But if the additional regulatory means violate sincerely held religious beliefs, then *Hobby Lobby* controls the substantial burden inquiry. That the

Fifth Circuit (and others) failed to recognize as much is proof enough of the need for this Court's intervention.

And to make matters worse, courts not only have impermissibly arrogated to themselves the authority to answer "a difficult and important question of religion and moral philosophy," *id.* at 2778, but have failed to grasp the true nature of the religious objections that employers are raising. These cases are not about whether the government can force religious employers to execute a "bit of paperwork." *PFL*, 772 F.3d at 237. Nor are they about whether religious employers have a right to prevent their employees from receiving access to coverage for the objected-to contraceptives. Rather, they are about whether the government may force religious employers, contrary to their religious convictions, to comply with a mandate to provide contraception coverage to their employees in a way that is "seamless" and ultimately involves the provision of contraceptive coverage via the religious employers' own plans.

The government would seem to be poorly positioned to question that its regulatory option involves a meaningful degree of complicity or facilitation. After all, HHS does not view its "accommodation" as an exemption from the requirement that petitioners provide a qualifying healthcare plan that includes the mandated contraceptives and abortifacients. Instead, the required paperwork is viewed as a means of complying with the contraceptive mandate, which ultimately flows from a statutory requirement. Having concluded that its accommodation is good enough (as a matter of administrative law) to put petitioners

in compliance with their regulatory and statutory obligations to provide no-cost contraceptive coverage, it takes real chutzpah for the government to then insist that this same accommodation involves no meaningful facilitation or complicity in the provision of those contraceptives and abortifacients. It is all well and good for the government to think *it* has threaded the needle and found a way for religious nonprofits to comply with the contraceptive mandate without violating their religious beliefs, but ultimately it is for the religious adherent to determine how much facilitation or complicity is too much.

Just like its need to ensure that its "accommodation" complies with the ACA, the government's need to ensure that its "accommodation" complies with ERISA (as well as the APA) likewise ensures that the degree of complicity and facilitation is substantial. That much is clear from the fact that the form or notice HHS requires employers to execute serves as "an instrument under which [its healthcare] plan is operated." App.143a. That instrument is essential to "ensure[] that there is a party with legal authority" to make payments for contraceptive services, 78 Fed. Reg. at 39880, as a TPA would have no contractual authority to pay claims without it. It is the "affirmative act" of executing that instrument—not the independent actions of any third parties—that petitioners sincerely believe would violate their religious beliefs. App.76a. The situation thus is not meaningfully different from one in which the government mandates that all hospitals perform abortions, but purports to "accommodate" religious hospitals by requiring them to sign a form authorizing doctors supplied and paid by the government to perform abortions on their

premises. It is not hard to see why a hospital would find little solace in the government's assurances that it is not "facilitating" abortion because its own doctors are not the ones that the hospital has authorized to use its facility to perform abortions.

As the foregoing confirms, the Fifth Circuit was simply wrong to insist that availing themselves of HHS's regulatory option for compliance with the contraceptive mandate would not require petitioners to "facilitat[e] access to contraceptives." App.18a. Indeed, as Judge Kavanaugh pointedly asked, "if the form were meaningless, why would the government require it?" *PFL*, slip op. 12, (Kavanaugh, J., dissenting). The answer is obvious: because it is not meaningless at all, but rather is essential to the operation of HHS's scheme for ensuring that nonexempt employers comply with the contraceptive mandate.

But ultimately, who has the better of the complicity and facilitation arguments is beside the point. What matters under RFRA and this Court's cases is that petitioners *sincerely believe* that complying with the contraceptive mandate via the nonprofit regulation would violate their religious beliefs, and that the government nonetheless is exerting substantial economic pressure—the exact same pressure as in *Hobby Lobby*—on petitioners to do so. The substantial burden analysis requires nothing more.

III. Under a correct application of well-established precedent, the "accommodation" option for satisfying the contraceptive mandate clearly fails RFRA's least restrictive means test.

In employing a fundamentally flawed substantial burden analysis, the Fifth Circuit avoided the only substantial question left open by *Hobby Lobby*—whether the regulatory "accommodation" available to nonprofits for satisfying the contraceptive mandate satisfies RFRA's least restrictive means analysis. In reality, that regulatory option cannot possibly withstand scrutiny under that "exceptionally demanding" standard. *Hobby Lobby*, 134 S.Ct at 2780. Indeed, many of the judges who have actually reached the question of whether the regulation is "the least restrictive means of furthering [a] compelling governmental interest," 42 U.S.C. § 2000bb-1, have had little trouble concluding that it is not. See, *e.g.*, *EWTN*, 756 F.3d at 1349 (Pryor, J., concurring); *PFL*, slip op. 17 (Brown, J., dissenting); *id.* at 23 (Kavanaugh, J., dissenting), *Notre Dame II*, 786 F.3d at 629-30 (Flaum, J., dissenting).

And with good reason, as the government has "many ways to increase access to free contraception without doing damage to the religious-liberty rights of conscientious objectors," *Korte* v. *Sebelius*, 735 F.3d 654, 686 (7th Cir. 2013), including by, among other things, "provid[ing] the contraceptive services or coverage directly to those who want them but cannot get them from their religious-organization employers." App.84a. Most obviously, the government could simply "treat employees [of religious objectors]

* * * the same as it does employees whose employers provide no coverage" by "providing for subsidized * * * contraceptive coverage * * * on [the] exchanges." *PFL*, slip op. 17 (Brown, J., dissenting). The government has barely even attempted to show that it gave the requisite "serious, good faith consideration," *Fisher* v. *Univ. of Tex. at Austin*, 133 S.Ct. 2411, 2420 (2013), to these alternatives before proceeding with its preferred course of enlisting petitioners in its efforts to provide their employees with contraceptive coverage.

Moreover, as several courts recognized when considering challenges to the contraceptive mandate by for-profit corporations before *Hobby Lobby*, it is hard to see how the government can claim a "compelling interest" in enforcing a mandate that, as a consequence of its own actions, "does not apply to tens of millions of people * * * includ[ing] those working for private employers with grandfathered plans, for employers with fewer than fifty employees," and for certain religious employers. *Hobby Lobby*, 723 F.3d at 1143-44; see also *Korte*, 735 F.3d at 686; *Gilardi* v. *U.S. Dep't of Health & Human Servs.*, 733 F.3d 1208, 1222 (D.C. Cir. 2013) vacated and remanded, 134 S.Ct. 2902 (2014); *EWTN*, 756 F.3d at 1351 (Pryor, J., concurring). Although this Court found no need to resolve the question in *Hobby Lobby*, it, too, noted that "it is arguable that there are features of the ACA that support th[e] view" that the contraceptive mandate does not serve a compelling government interest. 134 S.Ct. at 2780; see *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 547 (1993) ("'[A] law cannot be regarded as protecting an interest "of the highest order" * * * when it leaves

appreciable damage to that supposedly vital interest unprohibited.'").

To the extent courts have concluded otherwise, once again they have done so only by employing reasoning that this Court affirmatively rejected in *Hobby Lobby*. In *Priests for Life*, for instance, the D.C. Circuit concluded that forcing religious employers to comply with the contraceptive mandate via the "accommodation" furthers the government's compelling interests in "improving public health" and "assuring women equal benefit[s]." 772 F.3d at 259, 262; accord *Notre Dame II*, 786 F.3d at 624 (Hamilton, J., concurring); *Korte*, 735 F.3d at 724 (Rovner, J., dissenting). But as this Court admonished in rejecting those same generic interests in *Hobby Lobby*, RFRA "contemplates a 'more focused' inquiry" that "requires" courts "to 'loo[k] beyond broadly formulated interests' and to 'scrutiniz[e] the asserted harm of granting specific exemptions to particular religious claimants'—in other words, to look to the marginal interest in enforcing the contraceptive mandate in these cases." 134 S.Ct. at 2779 (quoting *Gonzales* v. *O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 431 (2006)); accord *Holt*, 135 S.Ct. at 863; *Korte*, 735 F.3d at 686 (articulating a compelling interest as general as "public health" or "gender equality" "seriously misunderstands strict scrutiny").

Once again, the government has barely even tried to satisfy the compelling interest test at the level of specificity that this Court's precedents demand. Instead, it has been content to rely on little more than "data" showing that women "generally" benefit from access to contraceptives and sheer speculation that

the female employees of nonexempt religious employers are more likely than "church[] employees" to do so. *PFL*, 772 F.3d at 265-66. Surely "the most demanding test known to constitutional law," *City of Boerne* v. *Flores*, 521 U.S. 507, 534 (1997), demands more than that. Indeed, the government's arguments do not even speak to whether it has a compelling interest in forcing an employer that, like petitioners, already covers most contraceptives to also facilitate access to the narrow category of contraceptives that it objects to on religious grounds.

Moreover, the government has admitted that it has *no interest* in enforcing the mandate against organizations that, like petitioners, hire only persons of the same faith. According to the government, it "does not undermine the governmental interests furthered by the contraceptive coverage requirement" to exempt houses of worship because they "are more likely" to hire coreligionists that share their objections. 78 Fed. Reg. at 39874. But that is exactly what petitioners do: They hire people of the same faith who share the same objection. App.37a-38a. Thus, by the government's own logic, exempting petitioners from the contraceptive mandate would "not undermine the governmental interests." 78 Fed. Reg. at 39874.[7]

In short, the government simply cannot bear its burden of proving that forcing religious employers to

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[7] Even if it did, moreover, the government has no legitimate interest here in discriminating between houses of worship and other religious organizations. See *Larson* v. *Valente*, 456 U.S. 228, 246-47 & n.23 (1982).

comply with the contraceptive mandate via the "accommodation" is the least restrictive means of furthering a compelling government interest. That makes this Court's review all the more essential, as the Fifth Circuit effectively dodged this issue by failing to employ the substantial burden test that this Court's precedents demand. It is bad enough that the government's unprecedented effort to force religious employers to take actions that violate their sincerely held religious beliefs escaped meaningful RFRA review in the Fifth Circuit. Petitioners should not be denied meaningful review in this Court as well before being forced to make the untenable choice that HHS has thrust upon them.

CONCLUSION

The petition should be granted.

Respectfully submitted.

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JULY 2015

APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Argued April 7, 2015 Decided June 22, 2015

No. 14-20112

EAST TEXAS BAPTIST UNIVERSITY;
HOUSTON BAPTIST UNIVERSITY,
PLAINTIFFS-APPELLEES,

WESTMINSTER THEOLOGICAL SEMINARY,
INTERVENOR PLAINTIFF-APPELLEE,

v.

SYLVIA MATTHEWS BURWELL, in her official capacity as Secretary of the United States Department of Health and Human Services;
THOMAS PEREZ, in his official capacity as Secretary of the United States Department of Labor;
JACOB J. LEW, in his official capacity as Secretary of the United States Department of Treasury;
UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES;
UNITED STATES DEPARTMENT OF LABOR;
UNITED STATES DEPARTMENT OF TREASURY,

DEFENDANTS-APPELLANTS.

Appeal from the United States District Court for the Southern District of Texas (No. 4:12-cv-03009)

NO. 14-10241

UNIVERSITY OF DALLAS,
PLAINTIFF-APPELLEE,
v.

SYLVIA MATTHEWS BURWELL, in her official capacity as Secretary of the United States Department of Health and Human Services;
THOMAS PEREZ, in his official capacity as Secretary of the United States Department of Labor;
JACOB J. LEW, in his official capacity as Secretary of the United States Department of Treasury;
UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES;
UNITED STATES DEPARTMENT OF LABOR;
UNITED STATES DEPARTMENT OF TREASURY,
DEFENDANTS-APPELLANTS.

Appeal from the United States District Court for the Northern District of Texas (No. 4:12-cv-00314)

NO. 14-40212

CATHOLIC DIOCESE OF BEAUMONT;
CATHOLIC CHARITIES OF SOUTHEAST TEXAS, INC.
PLAINTIFFS-APPELLEES,
v.

SYLVIA MATTHEWS BURWELL, in her official capacity as Secretary of the United States Department of Health and Human Services;
THOMAS PEREZ, in his official capacity as Secretary of the United States Department of Labor;
JACOB J. LEW, in his official capacity as Secretary of

the United States Department of Treasury;
UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES;
UNITED STATES DEPARTMENT OF LABOR;
UNITED STATES DEPARTMENT OF TREASURY,
DEFENDANTS-APPELLANTS.

Appeal from the United States District Court for the Eastern District of Texas (No. 4:12-cv-00709)

NO. 14-10661

CATHOLIC CHARITIES, DIOCESE OF FORT WORTH, INC.,
PLAINTIFF-APPELLEE,

v.

SYLVIA MATTHEWS BURWELL, in her official capacity as Secretary of the United States Department of Health and Human Services;
THOMAS PEREZ, in his official capacity as Secretary of the United States Department of Labor;
JACOB J. LEW, in his official capacity as Secretary of the United States Department of Treasury;
UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES;
UNITED STATES DEPARTMENT OF LABOR;
UNITED STATES DEPARTMENT OF TREASURY,
DEFENDANTS-APPELLANTS.

Appeal from the United States District Court for the Northern District of Texas (No. 4:12-cv-00314)

Before: REAVLEY, SMITH and GRAVES, *Circuit Judges*.

JERRY E. SMITH, *Circuit Judge*: In these consolidated appeals, religious organizations challenge, under the Religious Freedom Restoration Act ("RFRA),[1] a requirement that they either offer their employees health insurance that covers certain contraceptive services or submit a form or notification declaring their religious opposition to that coverage. The district courts held that the requirement violates RFRA or, in one case, that the plaintiffs had demonstrated a substantial likelihood of establishing that it does, so they enjoined the government from enforcing it. Because the plaintiffs have not shown and are not likely to show that the requirement substantially burdens their religious exercise under established law, we reverse.

I.

A.

Under the Affordable Care Act ("ACA"),[2] employers with fifty or more full-time employees generally must offer their employees a group health plan[3] that provides "minimum essential coverage."

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[1] 42 U.S.C. §§ 2000bb to 2000bb-4, *invalidated in part by City of Boerne v. Flores*, 521 U.S. 507 (1997).

[2] Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of the U.S. Code).

[3] The term "group health plan" includes both insured plans, in which an insurer writes a policy and bears the risk of claims, and self-insured plans, in which the employer bears the risk but may contract with a third-party administrator to perform administrative tasks such as processing claims.

See 26 U.S.C. §§ 4980H(a), (c)(2), 5000A(f)(2). Plans typically must cover all FDA-approved contraceptive methods and sterilization procedures for women[4] without copayments or deductibles.[5] Two types of plans are automatically exempt from the so-called contraceptive mandate: grandfathered plans, meaning those that have not made certain specified changes since March 2010, *see* 42 U.S.C. § 18011(a), and plans offered by religious employers, defined by reference to the Tax Code to include mostly churches themselves, as distinguished from associated educational or charitable institutions.[6] An employer that does not comply with these requirements faces draconian penalties: $2,000 per full-time employee per year for not offering a plan at all[7] and $100 per affected individual per day for offering a plan that provides insufficient coverage, 26 U.S.C. § 4980D(a), (b)(1).

An "accommodation" is available to religious entities that do not qualify as religious employers but seek exemption from the mandate. To avail itself of

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[4] We refer to the contraceptive methods and sterilization procedures collectively as "contraceptives" unless otherwise indicated.

[5] *See* 42 U.S.C. § 300gg-13(a)(4); Group Health Plans and Health Insurance Insurers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725, 8725–26 (Feb. 15, 2012).

[6] *See* 45 C.F.R. § 147.131(a) (citing 26 U.S.C. § 6033(a)(3)(A)(i), (iii)).

[7] 26 U.S.C. § 4980H(a), (c)(1). The penalty applies if at least one employee enrolls in a subsidized plan through an exchange. *See id.* § 4980H(a)(2).

that option, (1) an organization must oppose, on religious grounds, providing coverage for some or all contraceptives; (2) it must be organized as a nonprofit; (3) it must hold itself out as religious; and (4) it must certify that it satisfies the foregoing criteria.[8] It can certify in two ways.

The first way is to complete EBSA[9] Form 700 and send it to its insurer or third-party administrator.[10] The person signing the form must certify that the organization meets the requirements and that the form is believed to be correct.[11] The form requires the name of the organization, the name and title of the person signing it, and contact information. DEP'T OF LABOR, *supra* note 11, at 1. The second way in which an organization can certify is to submit a notice to the Department of Health and Human Services ("HHS").[12] The notice need not take a particular form but must include the name of the organization; a statement that it opposes, on religious grounds, providing coverage for some or all contraceptives; the name and type of the plan; and the name and contact information of the plan's

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[8] 26 C.F.R. § 54.9815-2713A(a); 29 C.F.R. § 2590.715-2713A(a); 45 C.F.R. § 147.131(b).

[9] "EBSA" stands for "Employee Benefits Security Administration," which is part of the Department of Labor.

[10] 29 C.F.R. § 2590.715-2713A(b)(1)(ii), (c)(1); 45 C.F.R. § 147.131(c)(1).

[11] DEP'T OF LABOR, EBSA FORM 700 1 (2014), http://www.dol.gov/ebsa/- preventiveserviceseligibleorganizationcertificationform.doc.

[12] 29 C.F.R. § 2590.715-2713A(b)(1)(ii), (c)(1); 45 C.F.R. § 147.131(c)(1).

insurer or third-party administrator, if applicable.[13]

The effect of applying for the accommodation depends on the type of plan and method of certification. If an employer with an insured plan uses Form 700, the insurer must exclude the objectionable coverage from the plan and provide "separate payments" for contraceptives for plan participants.[14] The insurer may not impose any direct or indirect costs for contraceptives on the employer or participants.[15] In addition, it must send a notice to participants, separately from plan materials, explaining that the employer does not administer or fund contraceptives but that, instead, the insurer provides separate payments.[16] If an employer with an insured plan submits a notice to HHS, then HHS notifies the insurer of its obligations, which are the same as if the employer had used Form 700.[17]

The process for self-insured plans is somewhat different. If an employer with a self-insured plan uses Form 700, the third-party administrator, if there is one, must either provide separate payments

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[13] *See* 29 C.F.R. § 2590.715-2713A(b)(1)(ii)(B), (c)(1)(ii); 45 C.F.R. § 147.131(c)(1)(ii).

[14] 29 C.F.R. § 2590.715-2713A(c)(2)(i); 45 C.F.R. § 147.131(c)(2)(i).

[15] 26 C.F.R. § 54.9815-2713A(c)(2)(ii); 29 C.F.R. § 2590.715-2713A(c)(2)(ii); 45 C.F.R. § 147.131(c)(2)(ii)

[16] 26 C.F.R. § 54.9815-2713A(d); 29 C.F.R. § 2590.715-2713A(d); 45 C.F.R. § 147.131(d).

[17] *See* 29 C.F.R. § 2590.715-2713A(c)(1)(ii), (2)(i); 45 C.F.R. § 147.131(c)(1)(ii), (2)(i).

(as an insurer would) or arrange for an insurer or other entity to do so. *See* 29 C.F.R. § 2590.715-2713A(b)(2). Third-party administrators and insurers that pay for contraceptives in this circumstance are eligible for government reimbursement of 115% of their expenses.[18] The prohibition on imposing costs and the notice requirement are the same as for insured plans.[19] Moreover, the form "shall be an instrument under which the plan is operated, shall be treated as a designation of the third party administrator as the plan administrator under section 3(16) of ERISA for [contraceptives], and shall supersede any earlier designation." *Id.* § 2510.3-16(b).

If an employer with a self-insured plan submits a notice to HHS, then HHS notifies the Department of Labor, which in turn notifies the third-party administrator of its obligations. *See id.* § 2590.715-2713A(b)(1)(ii)(B). The result is the same as if the employer had used Form 700, *id.* § 2590.715-2713A(b)(1)(ii)(B), (2), except that it is the notice from the Department of Labor, instead of Form 700, that is treated as an instrument under which the plan is operated and as designation of the plan administrator, *id.* § 2510.3-16(b).

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[18] 29 C.F.R. § 2590.715-2713A(b)(3); 45 C.F.R. § 156.50(d); Patient Protection and Affordable Care Act; HHS Notice of Benefit and Payment Parameters for 2015, 79 Fed. Reg. 13744, 13809 (Mar. 11, 2014).

[19] *See* 26 C.F.R. § 54.9815-2713A(d); 29 C.F.R. § 2590.715-2713A(b)(2), (d).

B.

The plaintiffs are religious organizations that oppose the use of some or all contraceptives. The sincerity of their beliefs is undisputed. The Dioceses of Fort Worth and Beaumont are automatically exempt from the mandate as religious employers, and the other plaintiffs are eligible for the accommodation.

The plaintiffs in *East Texas Baptist University* are East Texas Baptist University and Houston Baptist University, which have self-insured plans[20] for their employees, and Westminster Theological Seminary, which offers an insured plan to its employees. Houston Baptist University's plan is a church plan, which is exempt from ERISA. The plaintiffs oppose abortion and believe that emergency contraceptives and intrauterine devices, which are included in the contraceptive mandate, can cause abortions. They are unwilling to provide or facilitate access to those products. They sued in the Southern District of Texas, and the court entered partial final judgment[21] and a permanent injunction against the government.

The plaintiffs in *University of Dallas*[22] are several Catholic organizations. The University of Dallas has a self-insured plan for its employees and an insured plan for its students. The Diocese of Fort Worth

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[20] All self-insured plans at issue in these appeals have third-party administrators.

[21] The court stayed other claims not at issue on appeal.

[22] The *University of Dallas* and *Diocese of Fort Worth* appeals arise from the same district-court case. We refer to those appeals collectively as "*University of Dallas*."

provides coverage to its employees through a church plan, and Our Lady of Victory Catholic School offers coverage to its employees through the diocese's plan.[23] Catholic Charities, Diocese of Fort Worth, has an insured plan for its employees. The plaintiffs oppose the use of any contraceptives to prevent pregnancy or induce abortion,[24] and providing or facilitating access to them for those purposes would violate their faith. They sued in the Northern District of Texas, and the court entered preliminary injunctions against the government.

The plaintiffs in *Diocese of Beaumont* are the Diocese of Beaumont, which provides coverage to its employees through a church plan, and Catholic Charities of Southeast Texas, which offers coverage to its employees through the diocese's plan.[25] Like the plaintiffs in *University of Dallas*, they oppose the use of any contraceptives to prevent pregnancy or induce abortion, and they object to providing or facilitating access to them for those purposes. They

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[23] The diocese is automatically exempt from the mandate as a religious employer, but Our Lady of Victory is not. The diocese is a plaintiff because it alleges that the regulations will require it either to sponsor a plan that complies with the mandate or to remove Our Lady of Victory from its plan.

[24] The Catholic plaintiffs do not oppose the use of contraceptives to treat medical conditions so long as the purpose is not to prevent pregnancy or induce abortion.

[25] As with the Diocese of Fort Worth and Our Lady of Victory, the diocese is automatically exempt from the mandate as a religious employer, but Catholic Charities is not. The diocese is a plaintiff because it alleges that the regulations will require it either to sponsor a plan that complies with the mandate or to remove Catholic Charities from its plan.

sued in the Eastern District of Texas, and the court entered final judgment and a permanent injunction against the government.

II.

We review a summary judgment *de novo*. *LaBarge Pipe & Steel Co. v. First Bank*, 550 F.3d 442, 449 (5th Cir. 2008). We review the grant of a preliminary or permanent injunction for abuse of discretion and the underlying legal conclusions *de novo*.[26]

III.

Under RFRA, the "[g]overnment shall not substantially burden a per- son's exercise of religion even if the burden results from a rule of general applicability" unless "it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(a) to (b). We begin and end our analysis with the substantial-burden prong.[27] The plaintiffs

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[26] *See Villas at Parkside Partners v. City of Farmers Branch*, 726 F.3d 524, 528 (5th Cir. 2013) (en banc) (permanent injunction), *cert. denied*, 134 S. Ct. 1491 (2014); *Lake Charles Diesel, Inc. v. Gen. Motors Corp.*, 328 F.3d 192, 195 (5th Cir. 2003)

[27] Westminster claims that the government waived its argument on this issue by failing to present it to the district court. We disagree. The government explained at length why it believes that the regulations do not substantially burden the plaintiffs' religious exercise.

must show that the challenged regulations substantially burden their religious exercise,[28] but they have not done so or, in *University of Dallas*, have not established a substantial likelihood of doing so. Because their claims fail on the merits, we need not consider the other requirements for an injunction.[29]

A.

A preliminary question—at the heart of this case—is the extent to which the courts defer to a religious objector's view on whether there is a substantial burden. The inquiry has three components: (1) What is the adherent's religious exercise? (2) Does the challenged law pressure him to modify that exercise?

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[28] *See City of Boerne*, 521 U.S. at 533–34 (noting that the burden is on the religious objector); *Diaz v. Collins*, 114 F.3d 69, 71–72 (5th Cir. 1997) (same).

[29] "To be entitled to a preliminary injunction, the applicant must show (1) a substantial likelihood that he will prevail on the merits, (2) a substantial threat that he will suffer irreparable injury if the injunction is not granted, (3) his threatened injury outweighs the threatened harm to the party whom he seeks to enjoin, and (4) granting the preliminary injunction will not disserve the public interest." *Lake Charles Diesel*, 328 F.3d at 195–96. "[A] plaintiff seeking a permanent injunction must . demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006).

(3) Is the penalty for noncompliance substantial? It is well established that the court accepts the objector's answer to the first question upon finding that his beliefs are sincerely held and religious.[30] It is also undeniable that the court evaluates the third question as one of law.[31] Although we have not directly addressed who decides the second question,[32] all of our sister circuits that have considered contraceptive-mandate cases have come to the same conclusion: The court makes that decision.[33] We

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[30] *See, e.g.*, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2777–79 (2014); *Thomas v. Review Bd.*, 450 U.S. 707, 713–16 (1981).

[31] *See, e.g.*, *Hobby Lobby*, 134 S. Ct. at 2775–77; *Sherbert v. Verner*, 374 U.S. 398, 403–06 (1963).

[32] East Texas Baptist University cites two Fifth Circuit cases applying the Texas version of RFRA, but those decisions merely confirmed that the court defers to the adherent's answer to the first question upon finding that his beliefs are sincerely held and religious. *See A.A. ex rel. Betenbaugh v. Needville Indep. Sch. Dist.*, 611 F.3d 248, 263–66 (5th Cir. 2010); *Merced v. Kasson*, 577 F.3d 578, 590–91 (5th Cir. 2009).

[33] *See Univ. of Notre Dame v. Burwell*, No. 13-3853, 2015 WL 2374764, at *6 (7th Cir. May 19, 2015) ("Although Notre Dame is the final arbiter of its religious beliefs, it is for the courts to determine whether the law actually forces Notre Dame to act in a way that would violate those beliefs."); *Geneva Coll. v. Sec'y U.S. Dep't of Health & Human Servs.*, 778 F.3d 422, 435 (3d Cir.) ("Without testing the appellees' religious beliefs, we must nonetheless objectively assess whether the appellees' compliance with the self-certification procedure does, in fact, trigger, facilitate, or make them complicit in the provision of contraceptive cover- age."), *mandate recalled and stayed sub nom. Zubik v. Burwell*, 135 S. Ct. 1544 (2015); *Priests for Life v. U.S. Dep't of Health & Human Servs.*, 772 F.3d 229, 247 (D.C. Cir. 2014) ("Accepting the sincerity of Plaintiffs' beliefs,

agree.

Two free-exercise cases are especially instructive.[34] In *Bowen v. Roy*, 476 U.S. 693 (1986), parents challenged the government's use of a Social Security number for their daughter because they believed that the use of the number would "rob her spirit." *Id.* at 695–97. The Court ruled for the government, reasoning that the parents were

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however, does not relieve this Court of its responsibility to evaluate the substantiality of any burden on Plaintiffs' religious exercise, and to distinguish Plaintiffs' duties from obligations imposed, not on them, but on insurers and [third-party administrators]. Whether a law substantially burdens religious exercise under RFRA is a question of law for courts to decide, not a question of fact."). The Sixth Circuit used the same approach in a pre-*Hobby Lobby* case, but the Supreme Court has since vacated and remanded that decision for reconsideration in light of *Hobby Lobby*. *See Mich. Catholic Conference & Catholic Family Servs. v. Burwell*, 755 F.3d 372, 385 (6th Cir. 2014) ("[A]lthough we acknowledge that the appellants believe that the regulatory framework makes them complicit in the provision of contraception, we will independently determine what the regulatory provisions require and whether they impose a substantial burden on appellants' exercise of religion."), *cert. granted and judgment vacated sub nom. Mich. Catholic Conference v. Burwell*, 135 S. Ct. 1914 (2015).

[34] Congress passed RFRA in response to *Employment Division v. Smith*, 494 U.S. 872 (1990), and one of the statute's purposes is "to restore the compelling interest test as set forth in [*Sherbert*, 374 U.S. 398,] and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)[,] and to guarantee its application in all cases where free exercise of religion is substantially burdened." 42 U.S.C. § 2000bb(b)(1). Accordingly, pre-*Smith* caselaw is relevant in interpreting RFRA. *See, e.g., McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465 *passim* (5th Cir. 2014); *Tagore v. United States*, 735 F.3d 324, 330 (5th Cir. 2013).

challenging the government's acts, not a bur- den on them, *id.* at 699–701, and that "[t]he Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens," *id.* at 699. The Court decided for itself whether the policy in question pressured the parents to modify their religious exercise, noting that, although

> Roy's religious views may not accept this distinction between individual and governmental conduct[,] [i]t is clear . . . that the Free Exercise Clause, and the Constitution generally, recognize such a distinction; for the adjudication of a constitutional claim, the Constitution, rather than an individual's religion, must supply the frame of reference.

Id. at 701 n.6 (citation omitted).

The Court used the same approach in *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988). The plaintiffs complained of the government's plan to construct a road and permit logging on federal land, which they had used for religious purposes. *Id.* at 441–42. Relying on *Roy*, the Court rejected their claim. *Id.* at 447–49. It accepted the plaintiffs' statement of their religious beliefs, *id.* at 449–51, but concluded that the project involved only the government's management of its own property, which did not implicate the plaintiffs' constitutional rights, *id.* at 453. The Court stressed that, "[w]hatever may be the exact line between unconstitutional prohibitions on the free exercise of religion and the legitimate conduct by government of its own affairs, the location of the line cannot depend

on measuring the effects of a governmental action on a religious objector's spiritual development." *Id.* at 451.

In addition, one RFRA case from the District of Columbia Circuit illustrates that the court decides the second question. In *Kaemmerling v. Lappin*, 553 F.3d 669 (D.C. Cir. 2008), an inmate objected to a requirement that he participate in the collection of a tissue sample, which the FBI would use to create a DNA profile, because he opposed on religious grounds the extraction and storage of DNA information. *Id.* at 673–74. The court ruled for the government. *Id.* at 686. It "[a]ccept[ed] as true the factual allegations that Kaemmerling's beliefs are sincere and of a religious nature—but not the legal conclusion, cast as a factual allegation, that his religious exercise is substantially burdened." *Id.* at 679. Applying that rule, it held that his religious exercise was not substantially burdened, because "[t]he extraction and storage of DNA information are entirely activities of the FBI, in which Kaemmerling plays no role and which occur after the BOP has taken his fluid or tissue sample (to which he does not object)." *Id.*

The Court did not address the issue in *Hobby Lobby*. There, closely held for-profit corporations challenged the contraceptive mandate based on their owners' religious opposition to some contraceptives. *Id.* at 2764–66. The corporations were neither automatically exempt from the mandate as religious employers nor eligible for the accommodation; they had to offer insurance that covered contraceptives or face large penalties. *Id.* at 2775–76. The Court held that the mandate violated RFRA as applied to the

corporations. *Id.* at 2785. The substantial-burden analysis addressed only the first and third questions. The Court rejected the government's theory "that the connection between what the objecting parties must do (provide health-insurance coverage for [contraceptives]) and the end that they find to be morally wrong (destruction of an embryo) is simply too attenuated," *id.* at 2777, explaining that drawing the line between acceptable and unacceptable levels of involvement was the owners' prerogative, *id.* at 2778–79. In doing so, the Court reaffirmed that courts defer to the objector's description of his religious exercise upon finding that his beliefs are sincerely held and religious. And the Court analyzed the substantiality of the penalties for noncompliance itself, rather than automatically accepting the corporations' position. *Id.* at 2775–77.

But the Court said nothing about the second question. It had no reason to, because there was no doubt that imposing large penalties for not offering insurance that covered contraceptives pressured the corporations to facilitate the use of contraceptives.

In the absence of further guidance from the Supreme Court, we are bound to follow *Roy* and *Northwest Indian Cemetery* by deciding, as a question of law, whether the challenged law pressures the objector to modify his religious exercise. The other circuits' decisions confirm the continued vitality of that approach.[35]

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[35] *See Notre Dame*, 2015 WL 2374764, at *6; *Geneva*, 778 F.3d at 435; *Priests for Life*, 772 F.3d at 247; *Kaemmerling*, 553 F.3d at 679.

B.

Although the plaintiffs have identified several acts that offend their religious beliefs, the acts *they* are required to perform do not include providing or facilitating access to contraceptives. Instead, the acts that violate their faith are those of third parties. Because RFRA confers no right to challenge the independent conduct of third parties, we join our sister circuits in concluding that the plaintiffs have not shown a substantial burden on their religious exercise.[36]

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[36] *See Notre Dame*, 2015 WL 2374764, at *6 ("As far as we can determine from the very limited record, the only 'conduit' [for payments for contraceptives] is between the [insurer and the third-party administrator] and Notre Dame students and staff; the university has stepped aside."); *Geneva*, 778 F.3d at 438 ("By participating in the accommodation, the eligible organization has no role whatsoever in the provision of the objected-to contraceptive services."); *Priests for Life*, 772 F.3d at 256 ("It is as a result of the ACA, and not because of any actions Plaintiffs must take, that Plaintiffs' employees are entitled to contraceptive coverage provided by third parties and that their insurers or TPA must provide it; RFRA does not entitle Plaintiffs to control their employees' relationships with other entities willing to provide health insurance coverage to which the employees are legally entitled. A religious adherent's distaste for what the law requires of a third party is not, in itself, a substantial burden; that is true even if the third party's conduct towards others offends the religious adherent's sincere religious sensibilities."). The Sixth Circuit reached the same result in its now-vacated decision. *See Mich. Catholic*, 755 F.3d at 390 ("The appellants allege that providing, paying for, and/or facilitating access to contraceptive coverage burdens their exercise of religion. [T]he exemption and accommodation framework does not require them to do any of these things. The framework does not permit them to prevent their insurance

First, the plaintiffs claim that their completion of Form 700 or submission of a notice to HHS will authorize or trigger payments for contraceptives. Not so. The ACA already requires contraceptive coverage: "A group health plan and a health insurance issuer offering group or individual health insurance coverage shall, at a minimum provide coverage for . . . with respect to women, such additional preventive care . . . as provided for in comprehensive guidelines" promulgated by HHS, 42 U.S.C. § 300gg-13(a)(4), which includes contraceptives.[37] That provision expressly requires insurers to offer coverage. And although it does not specifically mention third-party administrators, they administer "group health plan[s]," which must include coverage. Nothing suggests the insurers' or third-party administrators' obligations would be waived if the plaintiffs refused to apply for the accommodation. Accordingly, the plaintiffs' completion of Form 700 or submission of a notice to HHS does not authorize or trigger payments for contraceptives, because the plaintiffs cannot authorize or trigger what others are already required by law to do.[38]

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issuer or third-party administrator from providing contraceptive coverage to their employees pursuant to independent obligations under federal law. However, the inability to 'restrain the behavior of a third party that conflicts with the [appellants'] religious beliefs,' does not impose a burden on the appellants' exercise of religion." (alteration in original) (citation omitted) (quoting *Mich. Catholic Conference v. Sebelius*, 989 F. Supp. 2d 577, 587 (W.D. Mich. 2013))).

[37] Group Health Plans and Health Insurance Insurers, 77 Fed. Reg. at 8725–26.

[38] *See Notre Dame*, 2015 WL 2374764, at *7–9 (concluding that

The plaintiffs offer two variations of that theory, but those are equally unconvincing. The plaintiffs assert that their listing the names and contact information of their insurers and third-party administrators will make it easier for the government to inform those entities of their obligations. It will, but that does not mean the plaintiffs' religious exercise is burdened. Without the accommodation, the plaintiffs would have to offer a plan that covered contraceptives,[39] so the effect of the government's communications with the insurers and third-party administrators is to shift the burden to those entities. Pro- viding the names and contact information facilitates only the plaintiffs' exemption, not contraceptive coverage.

Separately, the self-insured plaintiffs contend that their completion of Form 700 or submission of a notice to HHS will make their third-party administrators eligible for the government's reimbursement. Again, it will,[40] but that does not mean the plaintiffs' religious exercise is burdened.

For the insured plans, the insurers will not lose money by paying for contraceptives, because the

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federal law, not the completion of Form 700 or submission of a notice to HHS, triggers payments for contraceptives); *Geneva*, 778 F.3d at 435–42 (same); *Priests for Life*, 772 F.3d at 252–56 (same).

[39] *See* 26 U.S.C. §§ 4980H(a), (c)(2), 5000A(f)(2); 42 U.S.C. § 300gg-13(a)(4); Group

Health Plans and Health Insurance Insurers, 77 Fed. Reg. at 8725–26.

[40] *See* 29 C.F.R. § 2590.715-2713A(b)(3); 45 C.F.R. § 156.50(d).

savings on pregnancy care at least are expected to equal the costs of contraceptives.[41] There is a potential problem for the self- insured plans, though: The third-party administrators do not bear the risk of claims, so they will not realize any savings on pregnancy care. The regulations prohibit passing on the costs of contraceptives, 29 C.F.R. § 2590.715-2713A(b)(2), but in an efficient market, the third-party administrators would be unable to avoid doing so without additional revenue. The reimbursement is the government's attempt to solve the problem by giving the third-party administrators additional money to cover the costs of contraceptives. Assuming the amount is sufficient, the reimbursement is what will allow the self- insured plaintiffs to avoid paying for contraceptives.

Second, the plaintiffs urge that the accommodation uses their plans as vehicles for payments for contraceptives. But that is just what the regulations prohibit. Once the plaintiffs apply for the accommodation, the insurers may not include contraceptive coverage in the plans.[42] The insurers and third-party administrators may not impose any direct or indirect costs for contraceptives on the plaintiffs[43]; they may not send materials about contraceptives together with plan materials[44]; in fact,

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[41] Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39870, 39877 (July 2, 2013).

[42] 29 C.F.R. § 2590.715-2713A(c)(2)(i)(A); 45 C.F.R. § 147.131(c)(2)(i)(A).

[43] 26 C.F.R. § 54.9815-2713A(c)(2)(ii); 29 C.F.R. § 2590.715-2713A(b)(2), (c)(2)(ii); 45 C.F.R. § 147.131(c)(2)(ii).

[44] 26 C.F.R. § 54.9815-2713A(d); 29 C.F.R. § 2590.715-2713A(d);

they must send plan participants a notice explaining that the plaintiffs do not administer or fund contraceptives.[45] The payments for contraceptives are completely independent of the plans.[46]

Third, the plaintiffs theorize that the requirement that they offer their employees a group health plan pressures them to authorize or facilitate the use of contraceptives. They must contract with the insurers and third-party administrators to offer a plan, and those entities pay for contraceptives. In the plaintiffs' view, the insurers and third-party administrators would not do so absent the contracts, so the contracts facilitate the use of contraceptives.

The plaintiffs misunderstand the role of the contracts. Under the accommodation, the contracts are solely for services to which the plaintiffs do not object; the contracts do not provide for the insurers and third-party administrators to cover contraceptives, do not make it easier for those entities to pay for contraceptives, and do not imply endorsement of contraceptives. *See supra* notes 42–46 and accompanying text. Instead, the plaintiffs are excluding contraceptive coverage from their plans and expressing their disapproval of it, but the government is requiring the insurers and third-party

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45 C.F.R. § 147.131(d).

[45] 26 C.F.R. § 54.9815-2713A(d); 29 C.F.R. § 2590.715-2713A(d); 45 C.F.R. § 147.131(d).

[46] *See Notre Dame*, 2015 WL 2374764, at *5–7 (explaining that the accommodation does not use the plans as vehicles for payments for contraceptives); *Geneva*, 778 F.3d at 438, 441 (same); *Priests for Life*, 772 F.3d at 253–54 (same).

administrators to offer it—separately from the plans—despite the plaintiffs' opposition. The plaintiffs' religious beliefs forbid them from providing or facilitating access to contraceptives, but the requirement that they enter into the contracts does not force them to do so. The acts that violate their faith are the acts of the government, insurers, and third-party administrators, but RFRA does not entitle them to block third parties from engaging in conduct with which they disagree.[47]

A hypothetical illustrates the breadth of the plaintiffs' position. Suppose a person needs a passport for an upcoming trip. She fills out the application, but as she is about to mail it, she learns that the State Department will assign her a number when it approves her request. She opposes, on religious grounds, the use of a number to identify her, *see generally Roy*, 476 U.S. at 695–97, as well as any act that would facilitate the use of a number, so she sues under RFRA.

That case is indistinguishable from the one at bar. The objector does not oppose completing the application but only the State Department's

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[47] *See Nw. Indian Cemetery*, 485 U.S. at 453 (holding that an adherent was not entitled to challenge a third party's actions that offended his beliefs); *Roy*, 476 U.S. at 701 (same); *Notre Dame*, 2015 WL 2374764, at *5–7 (concluding that the requirement to offer a plan does not impose a substantial burden, because the contracts with the insurers and third-party administrators do not facilitate the use of contraceptives); *Geneva*, 778 F.3d at 438 n.13 (same); *Priests for Life*, 772 F.3d at 253 (same); *Kaemmerling*, 553 F.3d at 679 (holding that an adherent was not entitled to challenge a third party's actions that offended his beliefs).

assigning her a number in response even though she need not help the department do so. The idea that she could force the department to justify, under strict scrutiny, its application requirement or use of a number is unreasonable. Yet the plain- tiffs here are making the same type of claim. Accepting such claims could subject a wide range of federal programs to strict scrutiny. Perhaps an applicant for Social Security disability benefits disapproves of working on Sundays and is unwilling to assist others in doing so. He could challenge a requirement that he use a form to apply because the Social Security Administration might process it on a Sunday.[48] Or maybe a pacifist refuses to complete a form to indicate his beliefs because that information would enable the Selective Service to locate eligible draftees more quickly.[49] The possibilities are endless, but we doubt Congress, in enacting RFRA, intended for them to be.

The Court did not resolve the issue in *Hobby Lobby* but, instead, rejected the government's notion that there was no substantial burden, because the intervening acts of third parties, such as employees' decisions to use contraceptives, made the connection between the plaintiffs' providing contraceptive coverage and the destruction of an embryo too attenuated. 134 S. Ct. at 2777–79. The distinction between that case and the instant one is that the regulations compelled the *Hobby Lobby* plaintiffs to

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[48] *See generally Geneva*, 778 F.3d at 439 n.14 (considering an analogous hypothetical).

[49] *See generally Notre Dame*, 2015 WL 2374764, at *18 (discussing a similar hypothetical).

participate in providing contraceptives, albeit in an indirect way. What the regulations require of the plain- tiffs here has nothing to do with providing contraceptives.

The difference is not just that there are more links in the causal chain here than in *Hobby Lobby*—a difference that would not change the outcome, given that we accept an adherent's judgment as to how much separation is enough.[50] It is also that the type of compelled act is quite different—the act at issue in this case is not one that authorizes or facilitates the use of contraceptives.

The *Hobby Lobby* Court did not consider this type of situation and actually suggested in *dictum* that the accommodation does not burden religious exercise: The majority noted that "HHS has effectively exempted certain religious nonprofit organizations" through the accommodation, *id.* at 2763, and the concurrence observed that "the accommodation equally furthers the Government's interest but does not impinge on the plaintiffs' religious beliefs," *id.* at 2786 (Kennedy, J., concurring).[51] Thus, *Hobby Lobby* is of no help to the plaintiffs' position, and the requirement to offer a group health plan does not burden their religious exercise.

Fourth, the self-insured plaintiffs postulate that

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[50] *See, e.g.*, *Hobby Lobby*, 134 S. Ct. at 2779; *Thomas*, 450 U.S. at 715.

[51] The Court cautioned that it did "not decide whether [the accommodation] com- plies with RFRA for purposes of all religious claims." *Hobby Lobby*, 134 S. Ct. at 2782.

they will be required to pay for contraceptives despite the regulations to the contrary. They say the government lacks the authority under ERISA to prohibit third-party administrators from passing on the costs, insurers are unlikely to work with the third- party administrators because of the small amounts involved (an insurer must seek reimbursement on behalf of a third-party administrator[52]), and the 115% reimbursement will not cover the costs.

This issue is not ripe, and we express no view on its merits. "A court should dismiss a case for lack of 'ripeness' when the case is abstract or hypothetical."[53] "The key considerations are 'the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.'"[54] "A case is generally ripe if any remaining questions are purely legal ones; conversely, a case is not ripe if further factual development is required."[55] "However, 'even where an issue presents purely legal questions, the plaintiff must show some hardship in order to establish ripeness.'"[56]

The plaintiffs' prediction that third-party

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[52] 29 C.F.R. § 2590.715-2713A(b)(3); 45 C.F.R. § 156.50(d).

[53] *Choice Inc. of Tex. v. Greenstein*, 691 F.3d 710, 715 (5th Cir. 2012) (quoting *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 833 F.2d 583, 586 (5th Cir. 1987)).

[54] *Id.* (quoting *New Orleans*, 833 F.2d at 586).

[55] *Id.* (quoting *New Orleans*, 833 F.2d at 587).

[56] *Id.* (quoting *Cent. & S. W. Servs., Inc. v. U.S. EPA*, 220 F.3d 683, 690 (5th Cir. 2000)).

administrators will attempt to charge them for contraceptives may not come to pass, so the matter is not fit for judicial decision. The administrative costs associated with payments for contraceptives may turn out to be low. If so, the insurers and third-party administrators will be eager to take advantage of the 115% reimbursement,[57] and the third-party administrators will profit from the arrangement and have no occasion to pass on the costs. The plaintiffs say that is unlikely because only a small number of their employees will use contraceptives. But their reasoning overlooks the economies of scale that the insurers and third-party administrators could establish by paying for contraceptives for the employees of many religious organizations.

On this record, there is no basis for assessing which outcome is most likely. And withholding court consideration would not harm the plaintiffs. There is no allegation that any third-party administrator has asked the plain- tiffs to pay for contraceptives. If that happened, the plaintiffs could challenge the regulations then and would have had to pay nothing in the meantime. As a result, we decline to reach the issue.

Fifth, the two dioceses, which are automatically exempt from the mandate as religious employers, submit that the regulations will require them either to sponsor a plan that complies with the contraceptive mandate or to remove from their plans

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[57] *See Notre Dame*, 2015 WL 2374764, at *7 (speculating as to why insurers and third-party administrators might want to participate in the scheme).

affiliated entities that are not religious employers but are eligible for the accommodation. That is a misreading of the regulations, which allow those types of organizations to share a plan provided that the entity that does not qualify as a religious employer applies for the accommodation.[58] Because the accommodation does not burden the plaintiffs' religious exercise, neither does a requirement that the dioceses do nothing and the affiliated entities apply for the accommodation.[59]

In short, the acts *the plaintiffs* are required to perform do not involve providing or facilitating access to contraceptives, and the plaintiffs have no right under RFRA to challenge the independent conduct of third parties. Because the plaintiffs have not shown that the regulations substantially burden their religious exercise or, in *University of Dallas*, have not demonstrated a substantial likelihood of doing so, we need not reach the strict-scrutiny prong or the other requirements for an injunction.

REVERSED.

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[58] *See* Coverage of Certain Preventive Services, 78 Fed. Reg. at 39886.

[59] *See Geneva*, 778 F.3d at 443–44 (explaining that the different treatment of dioceses and affiliated organizations does not impose a substantial burden).

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

EAST TEXAS BAPTIST UNIVERSITY and
HOUSTON BAPTIST UNIVERSITY,
PLAINTIFFS,

and

WESTMINSTER THEOLOGICAL SEMINARY,
PLAINTIFF-INTERVENOR,

v.

KATHLEEN SEBELIUS, et al.
DEFENDANTS

Civil No. 12-3009

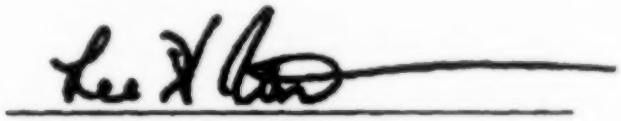
ORDER

LEE H. ROSENTHAL, *District Judge*:

Having considered Plaintiffs' unopposed motion for Rule 54(b) certification and for a stay, the Court GRANTS Plaintiffs' motion. The Court FINDS, based

on the parties' submissions and the unique circumstances of the nationwide parallel litigation concerning the issues in this lawsuit, and pursuant to Rule 54(b), that there is no just reason for delay of final judgment on Plaintiffs' Religious Freedom Restoration Act claims. The Court therefore CERTIFIES that its order of injunction dated December 27, 2013, Dkt. 134, constitutes a permanent injunction and partial final judgment.

The Court further ORDERS that litigation of Plaintiffs' remaining claims in this Court, including all of their constitutional and Administrative Procedure Act claims, be STAYED until further order of this Court.



LEE H. ROSENTHAL
UNITED STATES DISTRICT JUDGE

January 21, 2014

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

EAST TEXAS BAPTIST UNIVERSITY, *et al.*,
PLAINTIFFS,

v.

KATHLEEN SEBELIUS, *et al.*,
DEFENDANTS

Civil Action No. H-12-3009

MEMORANDUM AND OPINION

LEE H. ROSENTHAL, *District Judge*:

The Affordable Care Act mandates coverage for contraceptive services in group health plans that employers must provide their employees. Churches, nonprofit religious organizations, and for- profit corporations owned by deeply religious individuals challenged this mandate as offensive to their religious beliefs. The federal government responded.

Recent regulations exempt "religious employers," primarily churches, from the mandate; provide an accommodation for nonprofit religious organizations allowing them to avoid direct involvement in providing coverage or paying for contraceptive products or devices they find offensive to their faith; and maintains the mandate for for-profit employers, regardless of their owners' sensibilities.

One set of cases, filed by for-profit employers, is before the Supreme Court.[1] A second set of cases, filed by nonprofit religious organizations, includes this case. Both sets of cases present difficult arguments that reflect the pluralistic society we both celebrate and struggle to preserve and protect.

In this second set of cases, the nonprofit religious organizations contend that the accommodation violates vital protections provided under the Religious Freedom Restoration Act and the Constitution, by requiring them to facilitate their employees' free access to emergency contraception or face crippling penalties. The government and an amicus respond that the accommodation sufficiently insulates the organizations from any religiously offensive conduct without stripping thousands of women from free access to emergency-contraceptive services that may be critical to avoiding unwanted pregnancies. The government and the amicus

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[1] *See Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013), *cert. granted*, 134 S. Ct. 678 (2013); *Conestoga Wood Specialties Corp. v. Sebelius*, 724 F.3d 377, *cert. granted*, 134 S. Ct. 678 (2013); *see also Gilardi v. U.S. Dep't of Health & Human Servs*, 733 F.3d 1208 (D.C. Cir. 2013); *Korte v. Sebelius*, 735 F.3d 654 (7th Cir. 2013).

forcefully argue that an injunction extending the exemption to the plaintiffs would permit them to impose their religious beliefs on their employees who may not share those beliefs by making access to free emergency contraceptives more difficult.

Several district courts have already issued opinions, with inconsistent results.[2] Because the issues are legal and the facts are essentially

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[2] For examples of district courts finding for non-profit plaintiffs on one or more claims, *see e.g., Southern Nazarene University v. Sebelius*, No. 13-cv-1015-F (W.D. Okla. Dec. 23, 2013); *Geneva College v. Sebelius*, No. 12-cv-00207(JCF) (W.D. Pa. Dec. 23 2013); *Legatus v. Sebelius*, No. 12-cv-12061-RHC-MJH (E.D. Mich. Dec. 20, 2013; *Roman Catholic Archbishop of Washington v. Sebelius*, No. 13-cv-1441 (ABJ) (D.D.C. Dec. 20, 2013) (enjoining mandate on "compelled silence" argument; but otherwise denying injunctive relief), emergency motion for expedited briefing for injunction filed Dec. 23 2013, No. 13-5371 (D.C. Cir.); *Reaching Souls Int'l v. Sebelius*, No. 13-cv-01092-D (W.D. Okla. Dec. 20, 2013); *Reaching Souls Int'l, Inc. v. Sebelius*, No. 5:13-cv- 1092-D (W.D. Ok. Dec. 20, 2013)(DeGiusti, J.); *Roman Catholic Archdiocese of New York v. Sebelius*, No. 12-cv-2542 (BMC), 2013 WL 6579764 (E.D.N.Y. Dec. 16, 2013) (holding that the accommodation violates RFRA and enjoining the mandate); *Persico v. Sebelius*, No. 13-cv-00303 (AJS) (W.D. Pa. Nov. 21, 2013); *Zubik v. Sebelius*, No. 13-cv-01459 (AJS) (W.D. Pa. Nov. 21, 2013).

For cases finding for the government on RFRA claims, *see, e.g., Catholic Diocese of Nashville v. Sebelius*, No. 3:13-cv-1303 (M.D. Tenn. Dec. 26, 2013); *University of Notre Dame v. Sebelius*, No. 13-cv-01276 (N.D. Ind. Dec. 20. 2013), emergency motion for injunction filed Dec. 23, 2013, No 13-3853 (7th Cir.); *Priests for Life v. U.S. Dep't of Health & Human Servs.*, No. 13-cv- 1261 (EGS), 2013 WL 6672400 (D.D.C. Dec. 19, 2013) (holding that the accommodation does not create a RFRA substantial burden), emergency motion for injunction filed Dec. 20, 2013, No. 13-5368 (D.C. Cir.).

undisputed, this and other district court opinions are at most data points, chiefly important as necessary steps to the appellate courts.

Based on the pleadings, the motion for the preliminary injunction and response, the parties' submissions, the lengthy oral argument, and the governing law, this court finds that the plaintiffs and the intervenor have demonstrated a substantial likelihood of success on the merits of their claim under the Religious Freedom Restoration Act. This court preliminarily enjoins the enforcement of the mandate to cover emergency contraception against the plaintiffs and intervenor. The reasons are explained below.

I. Background

The plaintiffs, two universities affiliated with the Baptist Church, and the intervenor, a seminary affiliated with the Presbyterian Church, (together, the "plaintiffs"), believe as a matter of faith that life begins when an egg becomes fertilized. They also sincerely believe that the emergency contraceptives their group health-plan issuer or third-party administrator will have to pay for under the ACA's mandate cause abortions. In the plaintiffs' view, emergency-contraceptive products are "abortifacients." The plaintiffs contend that the ACA's accommodation is infirm under the Constitution and RFRA because the accommodation requires them to take an action that triggers and facilitates their employees' free access to abortion-causing drugs, making the plaintiffs complicit in the taking of innocent life and causing them to violate their belief that they must protect the innocent human life that is a fertilized egg. Because both

failing to comply with the accommodation's requirements and refusing to provide emergency-contraceptive group health-plan coverage would expose the plaintiffs to onerous financial penalties, they argue that the ACA's mandate and accommodation violate the Religious Freedom Restoration Act, the Free Exercise Clause, the Establishment Clause, and the Free Speech Clause.

The plaintiffs seek a preliminary injunction barring enforcement of the mandate and partial summary judgment on their claims under the Religious Freedom Restoration Act, the Free Exercise Clause, the Establishment Clause, and the Free Speech Clause. The government has cross-moved for summary judgment.

A. The Plaintiffs

The varieties of religious beliefs affect how the issue is presented. In some cases, the challenging organization is affiliated with a religion, such as the Catholic Church, that opposes all contraception, including pills designed to prevent an egg from becoming fertilized. The plaintiffs in this case are affiliated with Protestant churches that believe that life begins at conception. The plaintiffs are not opposed to all contraception methods, but they are opposed to some, including those that prevent a fertilized egg from implanting in the uterus. Details about each of the parties are set out below.

1. East Texas Baptist University

In October 1912, the State of Texas chartered the College of Marshall, a two-year college in Marshall, Texas. (Docket Entry No. 70–1, Ex. A–1.) The College of Marshall registered its first class in 1917. (*Id.*) In

1924, the Baptist General Convention of Texas assumed the college's debt. (*Id.*) In 1944, the College of Marshall changed its name to East Texas Baptist College and "elevated" to a four-year institution. (*Id.*) The Southern Association of Colleges and Schools accredited East Texas Baptist College in 1957. (*Id.*) In 1984, the school became East Texas Baptist University ("ETBU"). In 2013, ETBU serves "over 1,250 students in 30 undergraduate degree programs and 4 graduate degree programs." (Docket Entry No. 70–1, Oliver Decl., at ¶ 7.)

ETBU is a nonprofit corporation affiliated with the Baptist General Convention of Texas. (Docket Entry No. 70–1, Ex. A–1.) A 36–member Board of Trustees governs ETBU. (*Id.*) The Baptist General Convention of Texas elects 19 board members; the ETBU Board elects the remaining 17. (*Id.*) ETBU holds its property in trust for, and conducts its affairs based on, the policies that the 36–member Board establishes. (*Id.*)

ETBU is a coeducational institution chartered as a "religious, arts and sciences and pre-professional studies institution of higher education." (*Id.*) ETBU commits itself to "Christian stewardship" and focuses on the "development of intellectual inquiry, social consciousness, wellness, skills for a contemporary society, global awareness, and Christian character, [because] these endeavors prepare students to serve humanity and the Kingdom of God." (*Id.*) ETBU believes that the "Christian faith provides the surest foundation for life," and "employ[s a] Christian faculty who are dedicated to teaching, scholarship, advising, and service as they model the principles of the Christian faith. As a Baptist university, [ETBU

is] committed to the integration of learning and Christian faith in the pursuit of truth." (*Id.*)

ETBU "seeks administrators, academic officers, faculty, and staff who have a personal relationship with Christ, who are familiar with truth as revealed in the Bible, who live out this truth in the presence of others, who can create an environment where Christ is lived out in the life of the individual, and who have the necessary knowledge, experience, and competence for the position." (*Id.*) In "their initial and continuing employment, administrators, faculty, and staff at [ETBU] are to profess a saving relationship with Jesus Christ and to exhibit a lifestyle that demonstrates that commitment." (*Id.*) ETBU "has about 227 full-time employees and 56 part-time employees" who profess these commitments. (Docket Entry 70–1, Oliver Decl., at ¶ 28).

Included in these commitments is a belief that "Scripture calls Christians to uphold the God-given worth of human beings, as the unique image-bearers of God, from conception to death." (*Id.* ¶ 16 (citing Genesis and Psalms)). Consistent with this belief, ETBU "condemns the taking of innocent human life ... and commands Christians to protect the weak and vulnerable." (*Id.* ¶ 18 (citing Exodus and Psalms)). ETBU follows the 2000 Baptist Faith and Message Study, including the commandment to "speak on behalf of the unborn and contend for the sanctity of all human life from conception to natural death." (*Id.* (quoting Ex. A–4)). ETBU "believes and teaches that abortion ends human life and is a sin." ETBU contends that [it] is a violation of [its] teachings and religious beliefs to deliberately provide insurance

coverage for, fund, sponsor, underwrite, or otherwise facilitate access to abortion-inducing drugs, abortion procedures, and related services." (*Id.* at ¶ 20). ETBU objects to the use of emergency contraception drugs, like Plan B and Ella, and to devices like copper IUDs, believing that those drugs and devices cause death to a fertilized embryo. (*Id.* at ¶¶ 23–26).

Consistent with those beliefs, the ETBU is self insured and uses a third-party administrator, Mutual Assurance Administrators, Inc. to provide its employees with a Healthcare Benefits Plan. Currently, the plan expressly excludes the emergency-contraceptive drugs and devices. (*Id.* ¶ 27; Docket Entry No. 70–1, Ex. A–7 at 50).

2. Houston Baptist University

Houston Baptist University ("HBU") is a Christian liberal-arts college in Houston, Texas. (Docket Entry No. 70–2, Sloan Decl., at ¶ 4). HBU is affiliated with the Baptist General Convention of Texas and with the national Southern Baptist Convention. (*Id.* at ¶ 5). The student handbook states that HBU's mission is "to provide a learning experience that instills in students a passion for academic, spiritual, and professional excellence as a result of [their] central confession, Jesus is Lord." (*Id.* at ¶ 6 (internal quotations omitted)). HBU's bylaws require that "all those who become associated with [HBU] as a trustee, officer, member of the faculty or of the staff, and who perform work connected with the educational activities of the University, must believe in the divine inspiration of the Bible, both the Old Testament and New Testament, [and] that man was directly created by God. (*Id.* ¶ 8). One of HBU's

institutional goals is to "express Christ's Lordship as a function of its academic mission." (*Id.* at ¶ 10 (quotation marks omitted)).

Similar to ETBU, HBU believes that "Scripture calls Christians to uphold the God-given worth of human beings, as the unique image bearers of God, from conception to death." (*Id.* ¶ 11 (citing Genesis and Psalms)). HBU, like ETBU, follows the 2000 Baptist Faith and Message, which instructs adherents that they "should speak on behalf of the unborn and contend for the sanctity of all human life from conception to natural death." (*Id.* ¶ 13). HBU considers this commitment when it hires faculty, "all of whom are expected to affirm and teach that human life exists from conception to natural death, that the dignity of life is a gift from God, and that as a result abortion, except where it is necessary to save the physical life of the mother, is a sin." (*Id.* ¶ 14). HBU has "about 355 full-time and 118 part-time employees." (*Id.* ¶ 24).

HBU also considers this commitment in admitting students. HBU admits students from all religions but expects that each student will abide by a Student Code of Conduct. This Code affirms that HBU "embraces a biblical position which honors the sanctity of life and cannot support actions which encourage or result in the termination of human life through suicide, euthanasia, or abortion-on-demand." (*Id.* ¶ 15 (quotation marks omitted)).

HBU "has a sincere religious objection to providing coverage for emergency contraceptive drugs Plan B and Ella, since it believes [that] those drugs could prevent a human embryo—which it understands to include a fertilized egg before it

implants in the uterus—from implanting in the wall of the uterus, causing the death of the embryo." (*Id.* ¶ 17). "The same objection applies to [certain] IUDs." (*Id.*) HBU believes that "artificial means of [preventing] the implantation of a human embryo [are] abortion[s]." (*Id.* ¶ 18). "It is similarly a violation of [HBU's] religious beliefs to deliberately take any action (including providing access to health insurance) that would facilitate access to abortion causing drugs, abortion procedures, and related services, even if those items were paid for by an insurer or a third party administrator and not by [HBU]." (*Id.* ¶ 20). Consistent with these views, [HBU's] employee health benefit plan does not cover abortions or emergency contraception such as Plan B, Ella, or other drugs and devices which it considers to be "abortion causing." (*Id.* at ¶ 22).

HBU is insured through a church health plan, Guidestone. Guidestone has contracted with Highmark Blue Cross Blue Shield to be the third-party administrator (TPA) of the HBU plan.

3. Westminster Theological Seminary

Founded in 1929, Westminster is a graduate-level theological seminary dedicated to the "[r]eformed understanding of the Christian faith" often associated with Presbyterianism. (Docket Entry No. 75–2 at ¶ 3). Westminster "exists to serve Christ and his kingdom by extending the knowledge of the glory of God in Christ until that knowledge covers the earth as the waters cover the seas." (*Id.* ¶ 5). Westminster requires its faculty to "subscribe *ex animo* to the Westminster Standards" and professes to hire "only personnel who belong to a Christian church and subscribe to a biblical orthodoxy (belief)

and orthopraxy (practice)." (*Id.* ¶¶ 10–11). These beliefs and practices include protecting and defending the innocent, including unborn children. (*Id.* ¶ 14). Westminster has 60 full-time employees and 65 part-time employees who profess these commitments. (*Id.* ¶ 24).

Westminster believes that abortions sinfully end human life. (*Id.* ¶ 16). Westminster believes that emergency contraception such as Plan B, Ella, and certain IUDs are "abortion causing." (*Id.* ¶¶ 17–19). "Westminster has a sincere religious objection to providing [insurance] coverage for the emergency contraceptive drugs Plan B and Ella and their variants, since it believes those drugs could prevent a human embryo—which it understands to include a fertilized egg before it implants in the uterus—from implanting ..., causing the embryo to die." (*Id.* ¶ 18). Westminster has the same objection to certain IUDs. As a result, "it is a violation of Westminster's teachings and religious beliefs for it to deliberately fund, sponsor, underwrite, or otherwise facilitate access to Plan B and Ella, or abortion—causing IUDs." (*Id.* ¶ 20). "It is similarly a violation of Westminster's religious beliefs to deliberately take any action (including providing access to health insurance) that would facilitate access to abortion—causing drugs, abortion procedures, and related services, even if those items were paid for by an insurer or a third party administrator and not by Westminster." (*Id.* ¶ 21).

Westminster is insured through Independent Blue Cross of Philadelphia. Curiously, though Westminster "would never condone insurance coverage for abortion-causing drugs, procedures or

related services ... its health insurer [had] inserted such coverage into Westminster's plan" without its knowledge. Westminster's insurer would not remove the coverage from its plan, and Westminster was trying "to find an insurer that will honor its requirements by providing health insurance without the offensive coverages, but has so far not found a viable alternative." (*Id.* ¶ 22). As the litigation proceeded, Westminster separated its medical care coverage from its pharmaceutical coverage so as to remove coverage for what it considers to be abortifacient drugs from its employees' health insurance plans. (Docket Entry No. 140). Apparently, however, Westminster's plan still covers the IUDs that it finds objectionable.

B. The ACA's Contraceptive Mandate and Accommodation

The ACA, enacted in 2010, with the Health Care and Education Reconciliation Act, established requirements for employer "group health plans," defined to include plans that are insured by issuers and plans self-insured by employers. The ACA requires coverage for many preventative medical services with no charge for the patient. The relevant requirement states that a "group health plan and a health insurance insurer offering group or individual health insurance coverage shall, at a minimum provide coverage for and shall not impose any cost sharing requirements" for "preventative care and screenings ... as provided for in comprehensive guidelines supported by the Health Resources and Services Administration." 42 U.S.C. § 300gg–13(a)(4).

On July 19, 2010, HHS published a First Interim Final Rule stating that it was "developing these

guidelines." 75 Fed.Reg. 41726, 41728 (July 2010). On July 19, 2011, the Institute of Medicine ("IOM"), a congressionally funded entity established to recommend guidelines for the preventative services necessary for women, issued a report. The IOM was given this task because there were no HRSA guidelines on preventative care for women when HHS issued the Interim Final Rules. The IOM report recommended including the "full range of Food and Drug Administration-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity." The HRSA adopted this recommendation on August 1, 2011, as *Women's Preventative Services: Required Health Plan Coverage Guidelines* (the "Guidelines"). (Docket Entry No. 70–3, Ex. C–1). The Guidelines required all non-grandfathered plans to "provide coverage without cost sharing in the first plan year ... that begins on or after August 1, 2012" for all FDA-approved "contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity." (*Id.*).

The FDA approves certain drugs that "prevent pregnancy after birth control failure or unprotected sex," including Levonorgestrel (Plan B) and ulipristal acetate (Ella). (*Id.*). The FDA also approves copper intrauterine devices that "may prevent [a fertilized] egg from attaching (implanting) in the womb (uterus)." (*Id.*) These drugs and devices are commonly known as emergency contraceptives.

Shortly after the HRSA published these Guidelines, the HHS amended the Interim Final Rule. 76 Fed.Reg. 46621–01 (Aug. 3, 2011). The

amended rule gave the "HRSA additional discretion to exempt certain religious employers from the Guidelines where contraceptive services are concerned [and to] establish the exemption." *Id.* at 46623. As amended, the regulation defined a "religious employer" as an organization that meets "all of the following" criteria:

> (1) The inculcation of religious values is the purpose of the organization.
>
> (2) The organization primarily employs persons who share the religious tenets of the organization
>
> (3) The organization serves primarily persons who share the religious tenets of the organization.
>
> (4) The organization is a nonprofit organization as described in section 6033(a)(1) and 6033(a)(3)(a)(i) or (iii) of the Internal Revenue Code of 1986, as amended.

76 Fed.Reg. at 46626. The fourth criteria "refers to churches, their integrated auxiliaries, and conventions or associations of churches, as well as to the exclusively religious activities of any religious order." 76 Fed.Reg. at 46623.

The mandate and religious-employer exemption caused "over 200,000 responses to the request for comments on the amended interim final regulations." 77 Fed.Reg. 8725, 8726–27 (Feb. 15, 2012). "[A] number of comments asserted that the religious employer exemption [wa]s too narrow." 77 Fed.Reg. at 8727. These comments came from religiously affiliated educational institutions, health-care organizations, and charities. *Id.* Some

"expressed concern that the exemption for religious employers will not allow them to continue their current exclusion of contraceptive services." Others "expressed concerns about paying for such services and stated that doing so would be contrary to their religious beliefs." *Id.*

In response, the HHS announced a "Temporary Enforcement Safe Harbor" period. 77 Fed.Reg. 8726. This postponed enforcement of the mandate against nonprofit organizations with religious objections, to allow the development of proposed changes accommodating the objections of nonexempt religious nonprofits. (Docket Entry No. 71–3, Ex. C–4, Department of Health and Human Services, *Guidance on the Temporary Enforcement Safe Harbor for Certain Employees* (updated June 28, 2013)). On March 21, 2012, the HHS published an Advanced Notice of Proposed Rulemaking announcing the intent to supplement the religious-employer exception with an accommodation for certain nonexempt religious organizations. 77 Fed.Reg. 16501, 16503 (March 21, 2012) ("[T]he Departments announced plans to expeditiously develop and propose changes to the final regulations ... [including] accommodating non-exempt, non-profit religious organizations' religious objections to covering contraceptive services....").

On February 6, 2013, the HHS published a Notice of Proposed Rulemaking with two "key changes" to the preventative services coverage rules:

First, the proposed rules would amend the criteria for the religious employer exemption to ensure that an otherwise exempt employer plan is not disqualified because the employer's purposes

extend beyond the inculcation of religious values or because the employer serves or hires people of different religious faiths. Second, the proposed rules would establish accommodations for health coverage established or maintained by eligible organizations, or arranged by eligible organizations that are religious institutions of higher education, with religious objections to contraceptive coverage. 78 Fed.Reg. 8456, 8460–61 (Feb. 2013).

The HHS proposed "eliminating the first three prongs of the [religious-employer] definition and clarifying the application of the fourth." *Id.* When the HHS "first defined religious employer, the primary goal was to exempt the group health plans of houses of worship.... By restricting the exemption primarily to group health plans established or maintained by churches, synagogues, mosques, and other houses of worship, and religious orders, the fourth prong of the current definition of religious employer would alone suffice to meet the goal." *Id.* The HHS also proposed an accommodation for "eligible organizations with religious objections to contraceptive coverage." *Id.* at 8462. The proposed accommodation would provide "plan participants and beneficiaries contraceptive coverage without cost sharing while insulating their employers or institutions of higher education from contracting, arranging, paying or referring for such coverage." *Id.* Over 400,000 comments were submitted.

The HHS issued the final mandate with the revised exemption and accommodation in June 2013. *See* 78 Fed. Reg. 39870 (July 2, 2013). The revision adopted the simplified definition of religious employer exempt from the mandate. The

accompanying explanation stated that "the simplified and clarified definition of religious employer continues to respect the religious interests of houses of worship and their integrated auxiliaries in a way that does not undermine the governmental interests furthered by the contraceptive coverage requirement," and noted that religious employers meeting this definition were "more likely than other employers to employ people of the same faith who share the same objection, and who would therefore be less likely than other people to use contraceptive services even if such services were covered under their plan." 78 Fed. at 39874. The final regulation defined an exempt religious employer an "organization that is organized and operates as a nonprofit entity and is referred to in [Internal Revenue Code] section 6033(a)(3)(A)(I) or (iii)." 45 C.F.R. § 147.131(a). "[C]hurches, their integrated auxiliaries, and conventions or associations of churches" qualify for the exemption, as well as the "exclusively religious activities of any religious order." 26 U.S.C.A. § 6033(a)(3)(A)(i, iii).

The final regulation included an accommodation for eligible organizations such as the plaintiffs. These organizations are not "religious employers" exempt from the requirement to include contraceptive coverage with no cost-sharing in their employee group health plans. "After meeting a self-certification standard, ..., nonprofit religious organizations that qualify for these accommodations are not required to contract, arrange, pay, or refer for contraceptive coverage; however, plan participants and beneficiaries ... will still benefit from separate payments for contraceptive services without cost sharing or other charge...." *Id.* The final regulation

defined an "eligible organization" that is not exempt but is subject to the accommodation as an organization that satisfies all of the following criteria:

> (1) The organization opposes providing coverage for some or all of the contraceptive services required to be covered ... on account of religious objections.
>
> (2) The organization is organized and operates as a nonprofit entity.
>
> The organization holds itself out as a religious organization.

45 C.F.R. § 147.131(b)(1–3).

If such an organization complies with the self-certification requirement, and meets additional requirements, it complies with the mandate and avoids the statutory penalties if it:

> (4) ... self-certifies, in a form and manner specified by the Secretary, that it satisfies the criteria in paragraphs (b)(1) through (3) of this section, and makes such self-certification available for examination upon request by the first day of the first plan year to which the accommodation in paragraph (c) of this section applies. The self-certification must be executed by a person authorized to make the certification on behalf of the organization, and must be maintained in a manner consistent with the record retention requirements under section 107 of the Employee Retirement Income Security Act of 1974.

45 C.F.R. § 147.131(b)(4).

Under the rule, an eligible organization must

prepare the self-certification and furnish a copy to its issuer or, if the organization self-insures, to its TPA on request once in the plan-coverage period. Those acts accomplished, the organization is deemed to have complied with the preventive-services mandate. The rule states:

> (c)(1) General rule. A group health plan established or maintained by an eligible organization that provides benefits through one or more group health insurance issuers complies for one or more plan years with any [preventative services requirement] to provide contraceptive coverage if the eligible organization or group health plan furnishes a copy of the self-certification described in (b)(4) of this section to each issuer that would otherwise provide such coverage in connection with the group health plan. An issuer may not require any documentation other than the copy of the self certification from the eligible organization regarding its status as such.

45 C.F.R. § 147.131(c)(1). "The final regulations do not require the self-certification to be submitted to any of the Departments." 78 Fed. Reg. 39878.

When the eligible organization is self-insured, the self-certification is provided to the TPA. If an issuer provides the coverage and payments, the self-certification goes to that issuer. The self-certification does more than state that the organization qualifies for the accommodation because it objects on religious grounds to contraceptive coverage. The form notifies the TPA or issuer of their obligations set out in the federal regulations.

Once a group health plan issuer is notified of and receives a copy of the organization's self-certification, the issuer must:

> (A) Expressly exclude contraceptive coverage from the group health insurance coverage provided in connection with the group health plan; and
>
> (B) Provide separate payments for any contraceptive services required to be covered under the [preventative services requirement] for plan participants and beneficiaries for so long as they remain enrolled in the plan.

45 C.F.R. § 147.131(c)(2)(i)(A, B). The issuer is required to pay for contraceptive services requested by plan participants and beneficiaries. The issuer must segregate premium revenue collected from the eligible organization from the monies used to make payments for contraceptive services. When it makes payments for contraceptive services used by plan participants and beneficiaries, the issuer must do so without imposing any premium, fee, or other charge, for any part, directly or indirectly, on the eligible organization, its group health plan, or its plan participants or beneficiaries. In making such payments, the issuer must ensure that it does not use any premiums collected from eligible organizations. A statement accompanying the accommodation explained that "cost neutrality" would remove the need for a source of money to pay for the emergency contraceptive products or services: "issuers have various options for achieving cost neutrality, notwithstanding that they must make payments for contraceptive services without cost sharing, premium, fee, or other charge to the eligible

organization, the group health plan, or plan participants." Fed.Reg. at 39877.

If the eligible organization's group plan is self-insured, the TPA must provide or arrange for payments for contraceptive services requested by plan participants or beneficiaries. *See* 26 C.F.R. 54.9815–2713A; 29 C.F.R. §§ 2510.3–16,2590.715–2713A. This requirement is imposed through the Department of Labor's ERISA enforcement authority. 78 Fed.Reg. at 39,874. The self-certification is "treated as a designation of the third party administrator(s) as plan administrator and claims administrator for contraceptive benefits pursuant to section 3(16) of ERISA." *Id.* at 39,879. The TPA must provide these services "without cost sharing, premium, fee, or other charge to plan participants or beneficiaries, or to the eligible organization or its plan." *Id.* at 39,879–80. The TPA may seek reimbursement for such payments through adjustments to its federally-facilitated Exchange ("FFE") user fees. *Id.* at 39,882.

The self-certification form provided to the TPA or issuer sets out the regulations requiring notice to plan participants and beneficiaries that they may get contraceptive coverage without cost. The regulations recognize that application materials are distributed to plan participants and beneficiaries for enrollment (or reenrollment) in group health coverage for each plan year. The regulations require the TPA or issuer to send notice separate from, but to the extent possible contemporaneous with, the application materials, advising plan participants and beneficiaries that the TPA or issuer provides separate payments for contraceptive services at no

cost as long as the participant or beneficiary remains enrolled in the plan. 29 C.F.R. § 2590.715–2713A(d); 45 C.F.R. § 147.131.

The accommodation is intended to insulate eligible nonprofit religiously affiliated organizations and their group health plans from having to "contract, arrange, pay or refer for contraceptive coverage." 78 Fed.Reg. at 39876. "[B]ecause the payments for contraceptive services are not a group health plan benefit ... th[e] policy ensures that eligible organizations and their plans do not contract, arrange, pay, or refer for contraceptive coverage, and that such coverage is expressly excluded from their group health insurance policies." *Id.*

Neither the issuer nor the TPA that has contracted with the employer to provide the group health plan may refuse to pay for the contraceptive benefits. On receiving the copy of the self-certification, the TPA may, however, decide not to enter into, or remain in, a contractual relationship with the eligible organization to provide administrative services for the plan. 29 C.F.R. § 2590.715–2713A(b)(2) ("If a third party administrator receives a copy of the self-certification ... and agrees to enter into or remain in a contractual relationship with the eligible organization or its plan to provide administrative services for the plan, the third party administrator shall provide or arrange payments for contraceptive services[.]") But to comply with the ACA and the companion provisions in ERISA and the Code, the eligible religious organization is prohibited from: (1) directly or indirectly interfering with a TPA's efforts to provide or arrange separate payments for contraceptive

services for participants or beneficiaries in the plan; and (2) directly or indirectly seeking to influence a TPA's decision to provide or arrange such payments. 29 C.F.R. § 2590.715–2713A(b)(1)(iii).

A religious organization eligible for the accommodation has choices to make by January 1, 2014. It may violate the mandate and incur penalties of $100 per day for each affected individual, 26 U.S.C. § 4980D(b)(1); it may violate the law by discontinuing all health-plan coverage for employees at a cost of $2,000 per employee, *id.* § 4980H(c)(1);[3] or it may self-certify that the organization qualifies for the accommodation. A TPA for a church plan not subject to ERISA that receives a self-certification from the eligible religious organization also has choices. It may discontinue participation in the church plan; it may refuse to change its coverage and expose the employer to ACA penalties; or it may help the employer with the accommodation by paying for requested contraceptive services.

In *Priests for Life*, the government argued that the $100 dollar tax penalty would not apply to the plaintiffs who refused the accommodation because their insurers would have to provide insurance coverage as required by law, including contraceptive coverage. *Priests for Life*, —— F.Supp.2d at —— n. 2, 2013 WL 6672400, *3 n. 2 (citing 42 U.S.C. §§ 300gg–13; 300gg–22; 76 Fed.Reg. 46,621,623 (Aug. 3, 2011)). But, as the court recognized in that case, the plaintiffs would still suffer the harm they alleged

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[3] The government has postponed the application of this penalty until 2015. *See* Docket Entry No. 70-2 ¶ 68.

because they would be left paying for the objectionable coverage. Additionally, though not slated for effect until 2015, the $2,000–per–employee fine would apply to employers who fail to *offer the opportunity to enroll* in the minimum coverage. 26 U.S.C. § 4980H(a). So if the plaintiffs refused the accommodation in addition to not providing the coverage, it appears that the insurer would have to force-place the insurance, which would expose the plaintiffs to severe administrative penalties.

C. The Parties' Arguments on the Impact of the Accommodation

The plaintiffs allege that the accommodation violates the Religious Freedom Restoration Act because it places a substantial burden on the freedom to follow the commands of their religion. The plaintiffs argue that self-certification facilitates access to free emergency contraceptives, in direct violation of the religious commandment that they protect innocent life from the moment of conception until death. The accommodation requires each plaintiff to provide a copy of the "self certification to the plan's health insurer (for insured health plans) or a third party administrator (for self-insured plans) in order for the plan to be accommodated with respect to the contraceptive coverage requirement."(Docket Entry No. 107–1, Ex. E–1). "This certification is an instrument under which the plan is operated." (*Id.*). The plaintiffs object to "designating" their TPA or insurer as administrators for their employees to receive emergency contraceptive benefits without cost. The self-certification notifies the TPA or issuer of their obligations to provide contraceptive-coverage benefits to employees otherwise covered by the plan

and to notify the employees of their ability to obtain these benefits. The plaintiffs argue that by requiring them to comply with the self-certification requirements, the government's accommodation makes them facilitate and trigger free access to emergency contraceptives for their employees. The plaintiffs argue that the accommodation forces them to take actions that make them complicit in what they believe to be immoral conduct, coerced by the threat of ruinous fines if they do not fill out the self-certification and provide it to their issuer or TPA.

The government does not contend that the plaintiffs' religious beliefs about abortion, abortifacients, or forced complicity through facilitation are insincerely held, unreasonable, or "fringe." Instead, the government argues that the accommodation does not require the plaintiffs to do much and does not require more than they were already doing in different contexts, and is therefore not burdensome at all. In the alternative, the government argues that should the court find a burden on the plaintiffs' religious exercise, the court should find the burden *de minimis* because the "real" actions that the plaintiffs find objectionable are independent actions taken by third parties. The government contends that the "forced" act of self-certification is too attenuated and removed from whether any employee receives free emergency contraceptives though the plaintiffs' TPA or issuer to impose a substantial burden that could violate RFRA.

II. The Legal Standards

To obtain a preliminary injunction, the plaintiffs must establish "(1) a substantial likelihood of success

on the merits, (2) a substantial threat of irreparable injury if the injunction is not issued, (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted, and (4) that the grant of an injunction will not disserve the public interest." *Janvey v. Alguire*, 647 F.3d 585, 595 (5th Cir.2011); *Nichols v. Alcatel USA, Inc.*, 532 F.3d 364, 372 (5th Cir.2008).

Summary judgment is appropriate if "no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a). Rule 56 "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which the party will bear the burden of proof at trial." *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir.1994) (en banc). "The movant bears the burden of identifying those portions of the record it believes demonstrates the absence of a genuine issue of material fact." *Triple Tee Golf, Inc. v. Nike, Inc.*, 485 F.3d 253, 261 (5th Cir.2007) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–25, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)). If the burden of proof at trial lies with the nonmoving party, the movant may satisfy its initial burden by " 'showing'—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case." *See Celotex*, 477 U.S. at 325, 106 S.Ct. 2548. While the party moving for summary judgment must demonstrate the absence of a genuine issue of material fact, it does not need to negate the elements of the nonmovant's case. *Boudreaux v. Swift Transp.*

Co., 402 F.3d 536, 540 (5th Cir.2005) (citation omitted).

In deciding a motion for summary judgment, the court draws all reasonable inferences in the light most favorable to the nonmoving party. *Connors v. Graves*, 538 F.3d 373, 376 (5th Cir.2008). When the moving party has met its Rule 56burden, the nonmoving party must identify specific evidence in the record and articulate how that evidence supports that party's claim. *Baranowski v. Hart*, 486 F.3d 112, 119 (5th Cir.2007). "This burden is not satisfied with some metaphysical doubt as to the material facts, by unsubstantiated assertions, or by only a scintilla of evidence." *Little*, 37 F.3d at 1075 (internal quotation marks and citations omitted). Factual controversies resolve in the nonmoving party's favor, "but only when there is an actual controversy, that is, when both parties have submitted evidence of contradictory facts." *Id.*

III. Article III Standing

The government challenged HBU's standing in its reply in support of its motion to dismiss plaintiffs' claims. (Docket Entry No. 103). The government argues that it cannot enforce the mandate through HBU's TPA because HBU is self-insured through a church plan. (*Id.* at 5 (citing 29 U.S.C. §§ 1002(16), 1003(b)(2); 29 C.F.R. § 2510.3–16(b); 78 Fed.Reg. 39,870, 39,879–80 (July 2, 2013))). According to the government, "HBU remains eligible for the accommodation under the final regulation promulgated by [the government] and therefore need not contract, arrange, pay, or refer for contraceptive coverage. But its TPA need not provide separate payments[.]" At bottom, the government argues that

even though HBU will have to self-certify, that self-certification will not result in any enforceable objectionable action by the TPA.

3This standing argument is unpersuasive for the reasons set out in *Roman Catholic Archdiocese,* 2013 WL 6579764, at *6–*7; *but see Roman Catholic Archbishop of Washington v. Sebelius,* No 13–1441(ABJ), at 46–51, ——F.Supp.2d ——, 2013 WL 6729515 (D.D.C. Dec. 20, 2013) (concluding that the plaintiff in a similar situation lacked standing because the government lacked the regulatory authority to penalize the plaintiff's TPA for not complying with the ACA's requirements). HBU's alleged injury-in-fact does not wholly depend on what its TPA may or may not be penalized for doing or not doing. Instead, HBU's injury arises from the fact that the accommodation requires it to comply with the self-certification steps or face severe penalties. As HBU argued in its reply to the standing argument, HBU is harmed when it has to fill out the form authorizing its TPA to provide coverage and payments for emergency contraceptives, designating its TPA as the administrator for no-cost-sharing contraceptive benefits, and informing the TPA of its statutory and regulatory obligations. The self-certification steps do not depend on whether the government currently has the ability to use the enforcement mechanism it has specified to punish the TPA if it does not comply with its statutory and regulatory obligations. That the government apparently missed a regulatory loophole and cannot currently penalize a TPA for a failure to follow the ACA's mandate does not eliminate what HBU must do or risk penalties, or eliminate what the ACA requires of both HBU and its TPA.

Similarly, HBU's standing does not turn on whether one of its employees actually seeks payment for emergency contraception, or whether HBU's TPA for a given year decides to end its contractual relationship with HBU. The government's present lack of ability to use the enforcement mechanism it specified if HBU's TPA refuses to provide what the ACA mandates and nonetheless maintains its relationship with HBU does not deprive HBU of standing in this case.[4]

IV. The Religious Freedom Restoration Act Claims

In 1990, the Supreme Court held that the "Free Exercise Clause of the First Amendment d[id] not prohibit governments from burdening religious

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[4] At the oral argument on the motion, HBU asked the rhetorical question: "I think the big question here is why is it so important for HBU to sign this form now, because under the defendants' approach, it's completely meaningless. They can't use it for anything.... What is the purpose of making HBU sign a form that doesn't mean anything and it doesn't mean anything so much that there's not even a wisp of Article III injury." (Tr. 46). The government responded that "the point of completing the self-certification form[ ] is that the regs provide that on all the accommodation he needs to do is self-certify, complete the requirement. And so although HBU's TPA isn't going to be required to make the payments, HBU itself is still subject to the contraceptive coverage requirement. [I]t [remains] eligible for the accommodation and that if it fills the self-certification form it then complies with the requirement also and so it also would not be subject to any of the enforcement scheme." (Tr. 102). The forced-choice of filling out the self-certification form or providing the coverage still exists. The form requires HBU to tell the TPA about its obligation to pay. That the government apparently missed a regulatory loophole for forcing the TPA to act does not affect HBU's standing.

practices through generally applicable laws." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424, 126 S.Ct. 1211, 163 L.Ed.2d 1017 (2006) (describing *Employment Div., Dep't of Human Resources of Ore. v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990)). In *Smith*, the Supreme Court also held that "the Constitution does not require judges to engage in a case-by-case assessment of the religious burdens imposed by facially constitutional laws." *Id.* (citation omitted). Congress rejected the Supreme Court's *Smith* holdings when it passed the Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. § 2000bb *et seq.* Noting that *Smith*" virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion," 42 U.S.C § 2000bb(a)(4), RFRA expressly "restore[d] the compelling[-]interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963)[,] and *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972), and [guaranteed] its application in all cases where free exercise of religion is substantially burdened" in order to "provide a claim ... to persons whose religious exercise is substantially burdened by government," § 2000bb(b)(1, 2). In other words, "the Federal Government may not, as a statutory matter, substantially burden a person's exercise of religion, 'even if the burden results from a rule of general applicability' " unless the government can satisfy the compelling-interest test. *O Centro*, 546 U.S. at 424, 126 S.Ct. 1211. (quoting § 2000bb–1(a)).

The plaintiffs have established a sincere religious belief that they cannot support, endorse, or facilitate

the use of emergency contraceptives. The plaintiffs have a sincerely held religious belief that any complicity in the procurement of what they consider to abortifacient drugs is a sin. The record contains ample evidence that plaintiffs have long professed that belief, fashioned the governance of their institutions around that belief, and that the belief is an important tenet of their faith and the mission of their institutions. The threshold inquiry under RFRA is whether the ACA's accommodation substantially burdens the exercise of that belief. *See Diaz v. Collins*, 114 F.3d 69, 71 (5th Cir.1997). If the court finds a substantial burden, the government must then show that the burden "is in furtherance of a compelling governmental interest" and that it "is the least restrictive means of furthering that compelling government interest." 42 U.S.C. § 2000bb–1(b).

The issue currently dividing district courts is whether the court's inquiry is limited to the magnitude of the pressure the government exerts in compelling the plaintiffs to self-certify their objection and thereby facilitate the provision of no-cost-sharing emergency contraceptive services to their employees, as the plaintiffs contend, or whether the court may (or must) also examine from an objective perspective the nature or quality of the acts or behavior the government compels or pressures the plaintiffs to perform, as the government contends. *Compare Roman Catholic Archdiocese v. Sebelius*, 987 F.Supp.2d 232, 251, 2013 WL 6579764, at *14 (E.D.N.Y. Dec. 16, 2013) ("The Court cannot say that "the line [plaintiffs] drew was an unreasonable one. *Thomas*, 450 U.S. at 715, 101 S.Ct. 1425."), *with Priests for Life*, —F.Supp.2d at — —, 2013 WL 6672400, at *10 (D.D.C. Dec. 19,

2013) (finding that "Plaintiffs have not stated a prima facie case under RFRA" because objectively viewed, completing the self-certification form was not a substantial burden.").

A. Substantial Burden

RFRA does not define "substantial burden," but the statute refers to and adopts cases that control the analysis. *See Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1069 (9th Cir.2008) (en banc) ("[T]he cases that RFRA expressly adopted and restored—*Sherbert, Yoder*, and federal court rulings prior to *Smith*—also control the 'substantial burden' inquiry."), *cert. denied*, 556 U.S. 1281, 129 S.Ct. 2763, 174 L.Ed.2d 270 (2009); *see also Merced v. Kasson*, 577 F.3d 578, 587–88 (5th Cir.2009) (beginning the "substantial burden" inquiry under TRFRA, the Texas RFRA analog, with a detailed analysis of *Sherbert* and *Yoder*). In *Sherbert*, "a member of the Seventh-day Adventist Church was discharged by her South Carolina employer because she would not work on Saturday, the Sabbath Day of her faith." *Sherbert*, 374 U.S. at 399, 83 S.Ct. 1790. She subsequently failed to find alternative employment because she refused to work on Saturday, which prompted her to apply for unemployment benefits under South Carolina law. South Carolina law required applicants to show good cause for failing to accept available suitable work. All levels of administrative and state judicial review concluded that her religious objections to Saturday work did not amount to good cause. The Supreme Court reversed, holding that:

> [N]ot only is it apparent that appellant's declared ineligibility for benefits derives solely

> from the practice of her religion, but the pressure upon her to forego that practice is unmistakable. The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.

Id. at 404, 83 S.Ct. 1790.

In *Yoder,* members of the Old Order Amish religion and the Conservative Amish Mennonite Church did not enroll their 14–and 15–year–old children in public or private school, as Wisconsin's compulsory school-attendance law required. *Yoder,* 406 U.S. at 208–09, 92 S.Ct. 1526. They believed "that their children's attendance at high school, public or private, was contrary to the Amish religion and way of life [and that] sending their children to high school ... would not only expose themselves to the danger of the censure of the church community [but also] endanger their own salvation and that of their children." *Id.* at 209, 92 S.Ct. 1526. They were subsequently convicted of violating the compulsory-attendance law and fined $5. *Id.* at 208, 92 S.Ct. 1526. The Wisconsin Supreme Court reversed and held that "the State had failed to make an adequate showing that its interest in 'establishing and maintaining an educational system overrides the defendants' right to the free exercise of their religion.'" *Id.* at 213, 92 S.Ct. 1526 (quoting 49 Wis.

2d 430, 447, 182 N.W.2d 539, 547 (1971)). The Supreme Court held that the

> impact of the compulsory-attendance law on respondents' practice of the Amish religion [wa]s not only severe, but inescapable, for the Wisconsin law affirmatively compels them, under threat of criminal sanction, to *perform acts* undeniably at odds with fundamental tenets of their religious beliefs.... [The compulsory-attendance law] carries with it precisely the kind of objective danger to the free exercise of religion that the First Amendment was designed to prevent.... [It] carries with it a very real threat of undermining the Amish community and religious practice as they exist today; they must either abandon belief and be assimilated into society at large, or be forced to migrate to some other and more tolerant region.

Id. at 218, 92 S.Ct. 1526 (emphasis added) (internal citation omitted). Yoder speaks in terms of "fundamental tenets." RFRA defines "exercise of religion" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." *See* 42 U.S.C. § 2000bb–2(4) (citing § 2000cc–5). That "definition is undeniably very broad, so the term 'exercise of religion' should be understood in a generous sense." *Korte v. Sebelius*, 735 F.3d 654, 674 (7th Cir.2013).

"Under RFRA, a 'substantial burden' is imposed only when individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit (*Sherbert*) or coerced to act contrary to their religious beliefs by threat of civil or

criminal sanctions (*Yoder*)." *Navajo Nation*, 535 F.3d at 1069–70. In the RLUIPA context, the Fifth Circuit has explained that the government "substantially burdens a religious belief" when it " 'truly pressures the adherent to significantly modify his religious behavior and significantly violate his religious beliefs.' " *Moussazadeh v. Texas Dept. of Criminal Justice*, 703 F.3d 781, 793 (5th Cir.2012) (quoting *Adkins v. Kaspar*, 393 F.3d 559, 570 (5th Cir.2004)).[5]

The courts recognize that a religious exercise may be substantially burdened by government action that compels a plaintiff to do something inconsistent with religious beliefs; forbids the plaintiff from doing something his religion requires; or indirectly pressures the plaintiff to act or refrain from acting in a way his religion requires. *See Korte*, 735 F.3d at 706 (Rovner, J., *dissenting*) (citations omitted) (describing three categories of substantial burden and aggregating cases). When the government forces people to do something their faith forbids to avoid punishment, including harsh fines, the government imposes a substantial burden. "While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial." *See Thomas v. Review*

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[5] The government's focus on the twice-repeated word "significant" is misplaced because the Fifth Circuit defines a government action as significant when it "(1) influences the adherent to act i a way that violates his religious beliefs, or (2) forces the adherent to choose between, on the one hand, enjoying some generally available, non-trivial benefit, and on the other hand, following his religious beliefs." *Id.* (citing *Adkins*. 393 F.3d at 570).

Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 718, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981).

The issue in this and similar cases is not whether the government is directly compelling or putting substantial pressure on the religious organizations to do something that they find inconsistent with their religious beliefs. All agree that the penalties for failing to self-certify and refusing to provide no-cost-sharing contraceptive services to employees as part of the group health plan benefits are onerous. Nor do these cases raise the issue of whether the plaintiffs' religious beliefs are sincerely held. The cases are clear that once a court determines that the religious tenet or practice is based on sincerely held religious belief, the court is not free to assess whether it is a central, critical, or important part of that religion. *See Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 717, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981). The beliefs need not be longstanding, central to the claimant's religious beliefs, internally consistent, consistent with any written scripture, or reasonable from another's perspective. They need only be sincerely held. The plaintiffs clearly meet this requirement.

The government argues that not all government-compelled or government-forbidden action substantially burdens a religious belief: "De minimis burdens on the free exercise of religion are not of constitutional dimension." *Rapier v. Harris*, 172 F.3d 999, n. 2 (6th Cir. 1999) (citing *Walsh v. La. High Sch. Athletic Ass'n*, 616 F.2d 152, 158 (5th Cir.1980), *cert. denied*, 449 U.S. 1124, 101 S.Ct. 939, 67 L.Ed.2d 109 (1981); *Windsor Park Baptist Church, Inc. v. Ark. Activities Ass'n*, 658 F.2d 618 (8th

Cir.1981)).[6] The government emphasizes *Kaemmerling v. Lappin*, 553 F.3d 669 (D.C. Cir. 2008), to develop the argument. In that case, Russell Kaemmerling, a federal prisoner, sought to enjoin the application of the DNA Analysis Backlog Elimination Act of 2000, 42 U.S.C. §§ 14135–14135(e). That act directed the Bureau of Prisons to collect body-tissue samples to have a bank of DNA identifiers for prisoners convicted of certain felonies. Kaemmerling was an evangelical Christian who held the sincere religious belief that collecting and retaining DNA was "tantamount to laying the foundation for the rise of the anti-Christ" *Id.* at 673. He argued that DNA sampling, collection, and storage without any limit on use violated "God's temple, as represented by one's mortal body, willed with the Holy Spirit." *Id.* at 678. "Kaemmerling [made] abundantly clear that he does not challenge the collection of any particular DNA carrier-such as blood, saliva, skin, or hair-but rather that, regardless of the medium by which the government acquires access to his DNA, he objects to the government collecting his DNA information from any fluid or tissue sample they may recover." *Id.* The objection was not an objection to the Bureau of Prisons collecting tissue or body samples, but an objection to

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[6] *Rapier* and a long line of RLUIPA and free exercise cases have found *de minimis* burdens in circumstances subjecting prisoners to temporary or transient conditions. For example, in *Rapier*, "the unavailability of a non-pork tray for Mr. Rapier at 3 meals out of 810 d[id] not constitute more than a de minimis burden on Mr. Rapier's free exercise of religion. Mr. Rapier ha[d] not alleged a routine or blanket practice of denying him pork-free meals." This line of cases is inapposite.

the government's later action of extracting DNA information from those samples. *See id.*

The D.C. Circuit concluded that Kaemmerling did "not allege facts sufficient to state a substantial burden on his religious exercise because he cannot identify any 'exercise' which is the subject of the burden to which he objects." *Id.*at 679. The actions that offended Kaemmerling's sincerely held religious beliefs were not his actions, but the independent actions of third parties. There was only one action required of him, and he did not object to it. The court concluded that the link between Kaemmerling's own act of allowing a sample of his fluid or tissue to be taken—to which he did not object—and the independent acts of others extracting DNA from those cells—to which he did object—was too attenuated and removed. The court explained:

> The extraction and storage of DNA information are entirely activities of the FBI, in which Kaemmerling plays no role and which occur after the [Bureau of Prisons] has taken his fluid or tissue sample (to which he does not object). The government's extraction, analysis, and storage of Kaemmerling's DNA information *does not call for Kaemmerling to modify his religious behavior in any way—it involves no action or forbearance on his part, nor [did] it otherwise interfere with any religious act in which he engages.* Although the government's activities with him fluid or tissue sample after the [Bureau of Prisons] takes it may offend Kaemmerling's religious beliefs, they [could not] be said to hamper his religious exercise because they do not

> "pressure [him] to modify his behavior and to violate his beliefs."

Id. at 679 (emphasis added) (quoting *Thomas*, 450 U.S. at 718, 101 S.Ct. 1425). Because Kaemmerling did not have to "modify his religious behavior," there was no burden, much less a substantial burden, on the exercise of his religion. *Id.* (citing *Bowen v. Roy*, 476 U.S. 693, 696–703, 106 S.Ct. 2147, 90 L.Ed.2d 735 (1986) (holding that the interference caused by the government's referring to a person using a social security number, which the person or her parents believe will " 'rob the spirit' of [the person] and prevent her from attaining greater spiritual power," is not a substantial burden because it does not "affirmatively compel appellees, by threat of sanctions, to refrain from religiously motivated conduct or to engage in conduct that they find objectionable for religious reasons.")).

When a plaintiff is compelled or pressured to engage in action that he does not object to on religious grounds, that compulsion or pressure does not require a modification of religious behavior and there is no actionable burden. That is true even if the plaintiff's action leads to acts by third parties, independent from what the plaintiff did, that the plaintiff does find religiously offensive.

Kaemmerling stated that "[a]n inconsequential or *de minimis* burden on religious practice does not rise to th[e substantial burden] level, nor does a burden on activity unimportant to the adherent's religious scheme." *Id.* at 678 (citing *Levitan v. Ashcroft*, 281 F.3d 1313, 1320 (D.C.Cir.2002)). But because the D.C. Circuit concluded that there was no modification of any religious behavior on

Kaemmerling's part, the "*de minimis* burden on religious practice" language appears to be dicta. And the case the D.C. Circuit cited for that proposition, *Levitan*, was not a RFRA case and was decided using approaches that do not apply under RFRA.

In *Levitan*, the appellants were federal prisoners and Catholics. A prison rule prevented them from consuming small amounts of wine during Communion at mass. The plaintiffs sued under the Free Exercise Clause of the First Amendment. The D.C. Circuit in *Levitan* noted that the plaintiffs did not bring a RFRA challenge. The statutory framework of RFRA is different than the constitutional framework of the First Amendment as applied to prisoners in 2002. In *Levitan*, the court, without citation, stated that the "challenged rule must also burden a central tenet or important practice of the litigant's religion." The court, despite the Supreme Court's warning to the contrary in *Smith*, explained:

> Nonetheless, it is sometimes the case that litigants can make no credible showing that the affected practice *is either central or important to their religious scheme. In such cases,* the *de minimis* burden imposed by the challenged law is not constitutionally cognizable. In other cases, in which the practice at issue is indisputably an important component of the litigants' religious scheme, such evidence may be relevant to overcome any claim that the impact of the challenged law is *de minimis*. Moreover, a rule that bans a practice that is not central to adherent's

> religious practice might nonetheless impose a substantial burden if the practice is important and based on a sincere religious belief.

Levitan, 281 F.3d at 1321 (emphasis added) (internal quotation marks and citations omitted). RFRA seems to foreclose the analysis that the D.C. Circuit used to conclude that some violations are *de minimis*. Whether the affected practice is central or important to a religion is not for the court to determine. "Recall that [under RFRA's statutory framework] 'exercise of religion' means 'any exercise of religion, *whether or not compelled by, or central to*, a system of religious belief.' " *Korte*, 735 F.3d at 682 (citing 42 U.S.C. § 2000cc–5(7)(A)). The definition of *de minimis* burden as originally used in the D.C. Circuit meant a burden that affected an unimportant or tangential religious practice. *Levitan* suggests that evidence of the importance of a practice to a religious scheme overcomes a claim that a law requires a *de minimis* burden. Finally, the D.C. Circuit recognized that a rule that bans an important, sincere belief would be substantial.

The government's reliance on *Kaemmerling* appears misplaced. First, it is unclear how the *de minimis* analysis applies in the RFRA context. Second, the plaintiffs have articulated an important and sincere religious belief that "overcome[s] any claim that the impact of the challenged law is *de minimis*." *Levitan*, 281 F.3d at 1321. Finally, and perhaps most importantly, the burden in *Kaemmerling* was insubstantial under RFRA because he did not object to what the government

forced *him* to do.[7] In the present case, of course, the plaintiffs vigorously object on religious grounds to the act that the government requires them to perform, not merely to later acts by third parties. And as discussed in more detail below, in the present case, the acts that follow from what the plaintiffs are required to do are not as independent or removed as they were in *Kaemmerling*.

Fifth Circuit case law also supports the conclusion that the RFRA substantial-burden inquiry does not allow the court to discard the plaintiff's view that a government-compelled or government-coerced modification is substantial. The Fifth Circuit considers whether a *burden* is insubstantial, that is, the compelling or coercive mechanism itself; not whether the modification is substantial.

In *Walsh*, the plaintiffs challenged the Louisiana High School Athletic Association rule that "upon the completion of elementary or junior high school, a student is eligible to participate immediately in interscholastic athletic competition only at a high school within his home district." *Walsh*, 616 F.2d at 155. There was also a transfer rule, "a student is ineligible to participate in interscholastic athletic competition for a period of one year if he matriculates at a high school outside of his home district after completing elementary or junior high

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[7] The D.C. Circuit's decision upholding a for-profit corporation's challenge to the ACA's contraceptive mandate, *Gilardi v. U.S. Dep't of Health and Human Servs.*, 733 F.3d 1208, 1217, cited *Kaemmerling* only three times, once rejecting the government's argument that the burden identified was too remote and too attenuated to be substantial.

school." *Id.* These rules were aimed at curbing recruitment of young athletes. The plaintiffs could not participate in interscholastic athletic competitions because they attended the only Lutheran high school in greater New Orleans operated by the Missouri Synod, and the school was outside their home district. The plaintiffs brought a free exercise challenge under the First Amendment. The Fifth Circuit rejected the argument:

> The rule merely prevents a child from participating in interscholastic athletic competition during his ninth grade year. Even so, the ambit of the rule is limited. It does not forbid a student from participating in all athletic activities. The transfer rule does not prevent ninth graders at Lutheran High School from participating in intramural athletic competition. Neither does the rule prohibit such students from trying out for or from practicing with the Lutheran High School varsity athletic teams. It simply prevents a child from representing Lutheran High School in an interscholastic athletic contest for a period of one year. The burden on the free exercise of religion is *de minimis*.

Id. at 158. The analysis focused on the nature and extent of the coercive pressure, finding that it was not substantial, and did not examine the decision to attend a religious school. *See also Tagore v. U.S.*, 735 F.3d 324, 330 (5th Cir.2013) ("Assuming, again, that Tagore succeeds in establishing a sincerely held religious belief that mandates her wearing a 3–inch kirpan blade, the remaining predicate to a prima facie RFRA case is whether the [restriction on blades

over 2.5 inches] substantially burdened her religious practice. This is not a serious hurdle: she gave up her job rather than wear a shorter-bladed kirpan." (citations omitted)).; accord *Johnson v. Robison*, 415 U.S. 361, 94 S.Ct. 1160, 39 L.Ed.2d 389 (1974) ("The challenged legislation in the present case does not require appellee and his class to make any choice comparable to that required of the petitioners in Gillette. The withholding of educational benefits involves only an incidental burden upon appellee's free exercise of religion—if, indeed, any burden exists at all."); *Braunfeld v. Brown*, 366 U.S. 599, 606, 81 S.Ct. 1144, 6 L.Ed.2d 563 (1961) (using "[s]tatutes which [both] tax income and limit the amount which may be deducted for religious contributions impose an indirect economic burden on the observance of the religion of the citizen whose religion requires him to donate a greater amount to his church" as example of insubstantial burden.); *Navajo Nation*, 535 F.3d at 1070 (holding that the burden was insubstantial when there was no government-coerced action or government-forced choice between the plaintiffs practicing their religion or receiving a government benefit).

The case law supports the conclusion that the requirement of a "substantial" burden focuses on the nature and effect of the government restraint. The religious organization plaintiffs have shown a sincerely held religious belief that the court cannot second-guess. The plaintiffs have also shown that if they do not comply with a certain requirement that they believe offends that belief, they will face onerous fines. The government does not dispute that the fines are onerous. But the government does

dispute that the requirement can reasonably be said to require a religiously offensive or burdensome act.

This court agrees that the inquiry does not end with a finding that the plaintiffs may face onerous fines. But the unsettled issue does not appear to be whether the court must accept the plaintiffs' subjective view of whether they are compelled or pressured to act in a religiously offensive way, or whether the court must examine the nature and quality of the act to gauge whether it is offensive from some kind of objective perspective. The case law provides an answer to this question: the plaintiffs' view of whether the act is religiously offensive controls. The dispute appears instead to focus on two related, but distinct, antecedent questions. The first question is whether what the plaintiff religious organizations object to is an act that *they* are compelled or pressured to do and that they were not already doing. The second question is whether what the religious organizations are required to do is sufficiently linked to what they *themselves* have identified as offensive to their religious faith to be burdensome. If what the organizations identify as the religiously offensive acts are independent acts of third parties too far removed from the organizations' own conduct, then there may be no substantial burden. But under RFRA case law, if the plaintiffs are themselves compelled or pressured by threat of punitive fines to: 1) themselves take or forbear from an action; and 2) it is their own action or forbearance that they find religiously offensive, there is a substantial burden.

The plaintiffs have demonstrated that the mandate and accommodation will compel them to

engage in an affirmative act and that they find this act—their own act—to be religiously offensive. That act is completing and providing to their issuer or TPA the self-certification forms. The act of self-certification does more than simply state the organization's religious objection to covering or paying for its employees to get emergency contraception. The self-certification act designates the organization's TPA as the TPA for contraception coverage. The act tells the TPA or issuer that it must provide the organization's employees coverage that gives those employees free access to emergency contractive devices and products. That act tells the TPA or issuer that it must notify the employees of that benefit.

The government argues that the plaintiffs were previously telling their TPAs or issuers not to provide coverage for emergency contraception and were previously declaring their religious objection to such devices and products, in a variety of ways. At least one court has found that the self-certification form does not require the religious organizations to do anything they were not already doing. *See Priests for Life,* —— F.Supp.2d ——, 2013 WL 6672400 (D.D.C. Dec. 19, 2013). But the self-certification form requires the organizations to do much more than simply protest or object. The purpose of the form is to enable the provision of the very contraceptive services to the organization's employees that the organization finds abhorrent. The form designates the organization's chosen TPA as the administrator for such benefits and requires the organization's chosen issuer or TPA to pay for the religiously offensive contraceptive services. The purpose and effect of the form is to accomplish what the

organization finds religiously forbidden and protests. If the organizations do not act in the way the accommodation requires, they face onerous fines. On January 1, 2014, the plaintiffs will be compelled or pressured to do something that they did not have to do on December 31, 2013.

The answer to the first question—does the accommodation compel or pressure the plaintiff religious organizations themselves to perform an act that they were not already doing—is clearly yes.

Citing *Kaemmerling* and *Thomas*, the government contends that RFRA is "a shield, not a sword" and that the plaintiffs cannot decide "what does and does not impose a substantial burden" on their beliefs. Those cases do not stand for such a robust proposition. Kaemmerling did not have to modify his behavior by engaging in an act he found religiously offensive. The plaintiff organizations do. *Thomas* instructs courts that it is the plaintiffs' decision on whether the acts they are required to engage in are religiously offensive, and that the courts are not to take it on themselves to decide whether the plaintiffs' decision was objectively reasonable. *See Thomas*, 450 U.S. at 715, 101 S.Ct. 1425. The answer to the second question—do the plaintiffs find the self-certification they are required to do religiously offensive because it makes them complicit in providing their employees with free and ready access to emergency contraceptives—is also yes.

The government focuses on this second question, the role of the plaintiffs' own act in leading to the religiously offensive result, in arguing that the act of self-certifying is too attenuated from the provision of

the contraceptive services to be a substantial burden. "Cases that find a substantial burden," the government argues, "uniformly involve a direct burden on the plaintiff rather than a burden imposed on another entity." One problem with this argument is that there is a burden on the plaintiffs, to fill out the self-certification form and comply with the related requirements, or pay a fine. A second problem is the assumption that once the self-certification is completed, the plaintiffs' involvement ends, and that removes or insulates the plaintiffs from providing the emergency contraceptive services they find religiously objectionable.

As to the first problem, the case law supports the conclusion that the accommodation's imposition on the plaintiffs of a required act—self-certification—that they find religiously offensive, coerced or pressured by exposure to punitive fines, meets the substantial burden test. The government's position that there is no direct burden imposed because the plaintiffs do not themselves have to arrange or pay for emergency contraceptives would require this court to make several inferences not supported by the case law. RFRA case law does not allow a court to substitute its judgment on whether the act the plaintiffs are required or forbidden to perform is or is not religiously offensive. *See Thomas,* 450 U.S. at 715, 101 S.Ct. 1425. It is insufficient to dismiss or discount the plaintiffs' religious objection to the act or forbearance based on the amount of work involved, as long as an act or forbearance on the plaintiffs' part is compelled or coerced by the government, including by the threat of large fines. The fact that filling out the self-certification form will take little time or effort does not determine whether it is religiously

offensive. *See, e.g., Roman Catholic Archdiocese,* 987 F.Supp.2d at 249, 2013 WL 6579764, at *13 ("This argument—which essentially reduces to the claim that completing the self-certification places no burden on plaintiffs' religion because 'it's just a form'—finds no support in the case law.").

As to the second problem, the allegations and undisputed facts in the record fail to support the government's argument. This is not a case in which the religiously offensive consequence—enabling free access to contraceptive devices and products—occurs only after, and independently of, any act or forbearance on the plaintiffs' part. Contrary to the conclusion reached in *Priests for Life,* —— F.Supp.2d ——, 2013 WL 6672400 (D.D.C. Dec. 19, 2013), the plaintiffs' self-certification and the group health plans they put into place are necessary to their employees' obtaining the free access to the contraceptives that the plaintiffs find religiously abhorrent. The plaintiffs' acts are not sufficient for their employees to achieve this access, but the plaintiffs' acts are necessary to this result, and that is enough for RFRA.

The plaintiffs admit that the analysis would be different if the only acts that followed their self-certification were the acts of their employees seeking free access to emergency contraception. If, for example, the only consequence of self-certification was that employees had to go to a government clinic that dispensed free emergency contraception, there would be no substantial burden on the plaintiffs. The religiously offensive conduct would be independent acts of third persons. But under the accommodation, the plaintiffs' employees would obtain coverage and

no-cost-sharing payments for emergency contraception only because the employees are otherwise covered by the plaintiffs' group health plan. The government has taken significant steps to separate this payment from the group health plan. But the coverage and payment for employees to obtain emergency contraceptive products and devices is because those employees are covered by the group health plan that the plaintiffs put into place. The coverage and payment occurs through the TPA the plaintiffs contracted with and who they have been required to designate as the administrator for contraceptive services through the self-certification form, or through the plaintiffs' issuer.

Both the TPA and issuer provide coverage and payment because the plaintiffs self-certify their unwillingness to do so through the plan itself. But the plaintiffs' employees can obtain such coverage and payment only as long as they are the plaintiffs' employees and on the plaintiffs' group health plan. It is the insurance plan that the religious-organization employer put into place, the issuer or TPA the employer contracted with, and the self-certification form the employer completes and provides the issuer or TPA, that enable the employees to obtain the free access to the contraceptive devices that the plaintiffs find religiously offensive.

Even accepting that the government has succeeded in preventing any payment by the religious organization for the religiously offensive devices, there is a causal link between the acts the plaintiffs must do under the accommodation and the provision of contraceptive devices and products to employees on a no-cost-sharing basis. The effort to

accommodate the religious organizations by reducing their involvement in providing their employees with such access to emergency contraception did not end the plaintiffs' involvement so as to avoid required acts on their part that offend their faith.

The court finds and concludes that the plaintiffs have established that they will likely succeed in showing a substantial burden under RFRA.

B. A Compelling Interest and the Least Restrictive Means

RFRA states that the "[g]overnment may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person ... is the least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. § 2000bb–1(b). This "compelling interest test" is described as applying "strict scrutiny."

The cases identify two interests the government asserts as compelling. The first is promoting public health. The second is ensuring equal access by women to health care services. The courts have consistently concluded that it is not enough under RFRA to identify " 'broadly formulated interests" that justify the "general applicability of government mandates.' " *Hobby Lobby*, 723 F.3d at 1143 (quoting *O Centro*, 546 U.S. at 431, 126 S.Ct. 1211). Instead, a court must " 'scrutinize[ ] the asserted harm of granting specific exemptions to particular religious claimants.' " *Id.* (*O Centro*, 546 U.S. at 431, 126 S.Ct. 1211). Under RFRA, it is not enough for the government to point to how the ACA as a whole may protect or promote public health. The issue is whether denying the limited religious

exemption from emergency contraceptives that potentially prevent implantation of fertilized eggs to eligible institutions like plaintiffs would undermine a compelling interest in protecting health. "RFRA requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened.' " *O Centro*, 546 U.S. at 431–32, 126 S.Ct. 1211.

The government has not clearly shown how denying these plaintiffs an exemption from the mandate to pay for employees to have no-cost-sharing access to emergency contraceptives would undermine a compelling interest in protecting women's health.[8] But even assuming that the

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[8] Nor does the record justify finding a compelling interest based on the government's slippery-slope argument that if the exemption for religious employers were extended to these plaintiffs, the government would be unable to enforce the regulations effectively. That argument depends on a showing that uniformity is critical such that granting the requested exemptions would undermine effective administration. *See, e.g., United States v. Lee*, 455 U.S. 252, 102 S.Ct. 1051, 71 L.Ed.2d 127 (1982) (rejecting a claimed exception to the obligation to pay Social Security taxes in part because "mandatory participation is indispensable to the fiscal vitality of the social security system" and that the "tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief."); *Hernandez v. Commissioner*, 490 U.S. 680, 700, 109 S.Ct. 2136, 104 L.Ed.2d 766 (1989). There are two problems with applying this argument to the religious exemption the plaintiffs seek. First, there are many secular and religious exemptions already built into the ACA. Although the government justifies each, such as

government has shown a compelling interest in preventing unwanted pregnancies and related health problems and in making emergency contraceptive devices readily available to as many women as possible because these devices are particularly effective in addressing specific health problems (such as effective post-intercourse pregnancy prevention when pre-intercourse drugs, devices, or products are medically contraindicated or ineffective), the government is also required to show that it has adopted the "least restrictive means" of serving that interest than the mandate-and-accommodation provides. Similarly, assuming that the government

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the exemptions for grandfathered plans and for statutorily defined religious employers (as opposed to religious nonprofit organizations), the number of exemptions seems inconsistent with a showing that granting the exemption the plaintiffs seek would undermine administrative efficacy. This is different from holding, as some courts have, that the existence of secular exemptions, such as for grandfathered plans or for small employers, undermines the government's ability to show that it is protecting a compelling interest in refusing an additional, religious exemption. *See, e.g., Korte*, 735 F.3d at 686; *Gilardi*, 733 F.3d at 1222–23. The fact that there are other exemptions does not in itself preclude the government from being able to show a compelling interest in applying the law to a particular religious organization or claimant. The point here is that if the government is opposing a RFRA exemption by asserting a general need for uniformity, the existence of a number of exemptions makes that more difficult.

More important, the government's argument for uniformity does not depend on any specific showing relating to the ACA or the accommodation. Rather, it is based on general slippery-slope concerns that could be raised in response to any RFRA claim to an exception to a generally applicable law. Categorically relying on a need for uniformity is not sufficient under RFRA, but it is what the government has done here.

may be able to show a compelling interest in preventing sex discrimination in the provision of health care, the government must then show that the mandate-and-accommodation are the least restrictive means of meeting that interest.

The courts have identified several "less restrictive means" of serving the interests the government has identified than a total denial of the religious exemption request. One is to have the government provide the contraceptive services or coverage directly to those who want them but cannot get them from their religious-organization employers. *See, e.g., Korte,* 735 F.3d at 686. If the numbers seeking such services is small because of the organizations' emphasis on hiring employees who subscribe to the same religious beliefs, the added tax consequence to the public from the religious-organization employers' refusal to pay would also be reduced. *See Lee,* 455 U.S. at 252, 102 S.Ct. 1051 (rejecting a religious exemption from the tax laws on the basis that it would be too burdensome on taxpayers generally to pay taxes for those refusing to do so). Another alternative would be to have the government work with third parties to provide emergency contraception without requiring the plaintiffs' active participation. *Korte,* 735 F.3d at 686. Still another alternative could be to have the employee self-certify on an as-needed basis that their employer is a religious nonprofit that does not provide coverage for such services. The plaintiffs identify other possible means, such as providing tax credits to employees who have to purchase the emergency contraception. The government has not explained why the mandate and accommodation is the least restrictive means of advancing a compelling government interest.

The result is to find and conclude that plaintiffs have shown both a substantial likelihood of succeeding on the merits of their claim that the mandate and accommodation substantially burden the plaintiffs' religious exercise and the absence of a genuine factual dispute material to this determination. The government has failed to show that the mandate and accommodation are the least restrictive means of advancing a compelling government interest.

This result is neither simply reached nor one-sided in consequence. Employees of religious organizations currently unable to claim the exemption, who do not share their employer's anti-contraception beliefs, will not receive the statutory benefit of emergency contraception coverage without cost-sharing. Employees who need emergency contraceptives will face their own unhappy choice between paying costs they would not incur in the absence of the exemption or risking an unwanted pregnancy. This burden and choice, which already exists for employees of religious employers, would be extended to nonprofit religious organizations. The ACLU as amicus argues that exempting the plaintiff organizations from the mandate and denying their employees emergency contraceptive coverage without cost sharing effectively imposes the plaintiffs' religious beliefs on nonbelieving employees and shifts the costs of the accommodation from accommodated believers to nonadherents and other third parties. *See, e.g., Sherbert,* 374 U.S. at 409, 83 S.Ct. 1790; *see also Korte,* 735 F.3d at 719–20 (Rovner, J., dissenting). To the extent this assumes that an employee would have an enforceable private right to ACA coverage, this is unclear. And

even recognizing the burden that granting the exemption imposes, it does not require employees to violate their own religious beliefs or abridge their religious liberties. Nor does the existence and recognition of this burden relieve the government of showing that the mandate and accommodation are the least restrictive means of serving a compelling interest in avoiding the burden by giving employees free access to emergency contraceptives.

V. The Remaining Requirements for Injunctive Relief and Summary Judgment

A. Injunctive Relief

"The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Opulent Life Church v. City of Holly Springs,* 697 F.3d 279, 295 (5th Cir.2012) (quotation omitted). The same is true for violations of RFRA; showing a likelihood of success on the merits shows irreparable injury. *O Centro,* 389 F.3d 973, 995 (10th Cir.2004), *aff'd, O Centro,* 546 U.S. at 439, 126 S.Ct. 1211 ("[The plaintiff] would certainly suffer an irreparable harm assuming of course that it is likely to succeed on the merits of its RFRA claim."); *see also Tyndale House Publishers, Inc. v. Sebelius,* 904 F.Supp.2d 106, 129 (D.D.C. 2012); *Legatus v. Sebelius,* 901 F.Supp.2d 980, 987 (E.D. Mich. 2012).

The plaintiffs' injury outweighs the government's injury if an injunction is granted. Granting the injunction preserves the status quo, which the government has failed to show a compelling interest in changing. *See Roman Catholic Archdiocese,* 987 F.Supp.2d 232, 2013 WL 6579764 (citing *Cornish v.*

Dudas, 540 F.Supp.2d 61, 65 (D.D.C.2008)); *see also Tyndale House Publishers*, 904 F.Supp.2d at 129–30 (D.D.C.2012).

The public interest weighs in favor of granting the injunction. Protecting constitutional rights and the rights under RFRA are in the public's interest. "Congress [has] obligated itself to explicitly exempt later-enacted statutes from RFRA, which is conclusive evidence that RFRA trumps later federal statutes when RFRA has been violated." *Hobby Lobby*, 723 F.3d at 1114, 1146. This is why some have equated RFRA to a constitutional right. *Id.* Having decided not to explicitly exempt the ACA from RFRA, it is in the public's interest to enjoin the application of federal statutes that violate RFRA.

The plaintiffs are entitled to an injunction preventing the enforcement of the mandate and accommodation to them, their plans, their TPAs, and their issuers.

B. Summary Judgment

The plaintiffs have shown that, based on the undisputed facts in the record, the accommodation violates RFRA as a matter of law. The plaintiffs are entitled to summary judgment on their RFRA claims. The government's cross-motion for summary judgment on the absence of a RFRA violation is denied.

VI. Conclusion

The court grants the plaintiffs' motion for summary judgment on the RFRA claim and denies the government's cross-motion for summary-judgment on the RFRA claim. The court denies both

the plaintiffs' and government's cross-motions on the constitutional claims as moot and without prejudice.

The government is enjoined from applying or enforcing the regulations that require the plaintiffs, their health plans, TPAs, or issuers, to provide or execute the self-certification forms that enable or require the TPA or issuer to provide health insurance coverage for the plaintiffs' employees for FDA-approved emergency contraceptive devices, products, or services under the requirements imposed in 42 U.S.C. § 300gg–13(a)(4), Pub.L. 11–148, § 1563(e)-(f), as well as the application of the penalties found in 26 U.S.C. §§ 4980D & 4980H, and 29 U.S.C. § 1132. An order of injunction will separately issue.

APPENDIX D

42 U.S.C. § 2000bb-1 provides:

§ 2000bb-1. Free exercise of religion protected

(a) In general

Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

(b) Exception

Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(c) Judicial relief

A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

42 U.S.C. § 300gg-13(a)(4) provides:

§ 300gg-13. Coverage of preventive health services

(a) In general

A group health plan and a health insurances issuer offering group or individual health insurance coverage shall, at a minimum provide coverage for and shall not impose any cost sharing requirements for—

* * *

(4) with respect to women, such additional preventive care and screenings not described in paragraph (1) as provided for in comprehensive guidelines supported by the Health Resources and Services Administration for purposes of this paragraph.

26 U.S.C. § 4980D provides:

§ 4980D. Failure to meet certain group health plan requirements

(a) General rule.—There is hereby imposed a tax on any failure of a group health plan to meet the requirements of chapter 100 (relating to group health plan requirements).

(b) Amount of tax.—

(1) In general.—The amount of the tax imposed by subsection (a) on any failure shall be $100 for each day in the noncompliance period with respect to each individual to whom such failure relates.

(2) Noncompliance period.—For purposes of this section, the term "noncompliance period" means, with respect to any failure, the period—

(A) beginning on the date such failure first

occurs, and

(B) ending on the date such failure is corrected.

(3) Minimum tax for noncompliance period where failure discovered after notice of examination.— Notwithstanding paragraphs (1) and (2) of subsection (c)—

(A) In general.—In the case of 1 or more failures with respect to an individual—

(i) which are not corrected before the date a notice of examination of income tax liability is sent to the employer, and

(ii) which occurred or continued during the period under examination,

the amount of tax imposed by subsection (a) by reason of such failures with respect to such individual shall not be less than the lesser of $2,500 or the amount of tax which would be imposed by subsection (a) without regard to such paragraphs.

(B) Higher minimum tax where violations are more than de minimis.—To the extent violations for which any person is liable under subsection (e) for any year are more than de minimis, subparagraph (A) shall be applied by substituting "$15,000" for "$2,500" with respect to such person.

(C) Exception for church plans.—This paragraph shall not apply to any failure under a church plan (as defined in section 414(e)).

(c) Limitations on amount of tax.—

(1) Tax not to apply where failure not discovered exercising reasonable diligence.—No tax shall be imposed by subsection (a) on any failure during any period for which it is established to the

satisfaction of the Secretary that the person otherwise liable for such tax did not know, and exercising reasonable diligence would not have known, that such failure existed.

(2) Tax not to apply to failures corrected within certain periods.—No tax shall be imposed by subsection (a) on any failure if—

(A) such failure was due to reasonable cause and not to willful neglect, and

(B)(i) in the case of a plan other than a church plan (as defined in section 414(e)), such failure is corrected during the 30-day period beginning on the first date the person otherwise liable for such tax knew, or exercising reasonable diligence would have known, that such failure existed, and

(ii) in the case of a church plan (as so defined), such failure is corrected before the close of the correction period (determined under the rules of section 414(e)(4)(C)).

(3) Overall limitation for unintentional failures.— In the case of failures which are due to reasonable cause and not to willful neglect—

(A) Single employer plans.—

(i) In general.—In the case of failures with respect to plans other than specified multiple employer health plans, the tax imposed by subsection (a) for failures during the taxable year of the employer shall not exceed the amount equal to the lesser of—

(I) 10 percent of the aggregate amount paid or incurred by the employer (or predecessor employer) during the preceding taxable year for group health plans, or

(II) $500,000.

(ii) Taxable years in the case of certain controlled groups.—For purposes of this subparagraph, if not all persons who are treated as a single employer for purposes of this section have the same taxable year, the taxable years taken into account shall be determined under principles similar to the principles of section 1561.

(B) Specified multiple employer health plans.—

(i) In general.—In the case of failures with respect to a specified multiple employer health plan, the tax imposed by subsection (a) for failures during the taxable year of the trust forming part of such plan shall not exceed the amount equal to the lesser of—

(I) 10 percent of the amount paid or incurred by such trust during such taxable year to provide medical care (as defined in section 9832(d)(3)) directly or through insurance, reimbursement, or otherwise, or

(II) $500,000.

For purposes of the preceding sentence, all plans of which the same trust forms a part shall be treated as one plan.

(ii) Special rule for employers required to pay tax.—If an employer is assessed a tax imposed by subsection (a) by reason of a failure with respect to a specified multiple employer health plan, the limit shall be determined under subparagraph (A) (and not under this subparagraph) and as if such plan were not a specified multiple employer health plan.

(4) Waiver by Secretary.—In the case of a failure which is due to reasonable cause and not to

willful neglect, the Secretary may waive part or all of the tax imposed by subsection (a) to the extent that the payment of such tax would be excessive relative to the failure involved.

(d) Tax not to apply to certain insured small employer plans.—

(1) In general.— In the case of a group health plan of a small employer which provides health insurance coverage solely through a contract with a health insurance issuer, no tax shall be imposed by this section on the employer on any failure (other than a failure attributable to section 9811) which is solely because of the health insurance coverage offered by such issuer.

(2) Small employer.—

(A) In general.—For purposes of paragraph (1), the term "small employer" means, with respect to a calendar year and a plan year, an employer who employed an average of at least 2 but not more than 50 employees on business days during the preceding calendar year and who employs at least 2 employees on the first day of the plan year. For purposes of the preceding sentence, all persons treated as a single employer under subsection (b), (c), (m), or (o) of section 414 shall be treated as one employer.

(B) Employers not in existence in preceding year.—In the case of an employer which was not in existence throughout the preceding calendar year, the determination of whether such employer is a small employer shall be based on the average number of employees that it is reasonably expected such employer will employ on business days in the current calendar year.

(C) Predecessors.—Any reference in this paragraph to an employer shall include a reference to any predecessor of such employer.

(3) Health insurance coverage; health insurance issuer.—For purposes of paragraph (1), the terms "health insurance coverage" and "health insurance issuer" have the respective meanings given such terms by section 9832.

(e) Liability for tax.—The following shall be liable for the tax imposed by subsection (a) on a failure:

(1) Except as otherwise provided in this subsection, the employer.

(2) In the case of a multiemployer plan, the plan.

(3) In the case of a failure under section 9803 (relating to guaranteed renewability) with respect to a plan described in subsection (f)(2)(B), the plan.

(f) Definitions.—For purposes of this section—

(1) Group health plan.—The term "group health plan" has the meaning given such term by section 9832(a).

(2) Specified multiple employer health plan.—The term "specified multiple employer health plan" means a group health plan which is—

(A) any multiemployer plan, or

(B) any multiple employer welfare arrangement (as defined in section 3(40) of the Employee Retirement Income Security Act of 1974, as in effect on the date of the enactment of this section).

(3) Correction.—A failure of a group health plan shall be treated as corrected if—

(A) such failure is retroactively undone to the

extent possible, and

(B) the person to whom the failure relates is placed in a financial position which is as good as such person would have been in had such failure not occurred.

26 U.S.C. § 4980H provides:

§ 4980H. Shared responsibility for employers regarding health coverage.

(a) Large employers not offering health coverage.— If—

(1) any applicable large employer fails to offer to its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan (as defined in section 5000A(f)(2)) for any month, and

(2) at least one full-time employee of the applicable large employer has been certified to the employer under section 1411 of the Patient Protection and Affordable Care Act as having enrolled for such month in a qualified health plan with respect to which an applicable premium tax credit or cost- sharing reduction is allowed or paid with respect to the employee,

then there is hereby imposed on the employer an assessable payment equal to the product of the applicable payment amount and the number of individuals employed by the employer as full-time employees during such month.

(b) Large employers offering coverage with employees who qualify for premium tax credits or cost-sharing reductions.—

(1) In general. —If—

(A) an applicable large employer offers to its full- time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan (as defined in section 5000A(f)(2)) for any month, and

(B) 1 or more full-time employees of the applicable large employer has been certified to the employer under section 1411 of the Patient Protection and Affordable Care Act as having enrolled for such month in a qualified health plan with respect to which an applicable premium tax credit or cost- sharing reduction is allowed or paid with respect to the employee,

then there is hereby imposed on the employer an assessable payment equal to the product of the number of full-time employees of the applicable large employer described in subparagraph (B) for such month and an amount equal to 1/12 of $3,000.

(2) Overall limitation.—The aggregate amount of tax determined under paragraph (1) with respect to all employees of an applicable large employer for any month shall not exceed the product of the applicable payment amount and the number of individuals employed by the employer as full-time employees during such month.

[(3) Repealed. Pub.L. 112-10, Div. B, Title VIII, § 1858(b)(4), Apr. 15, 2011, 125 Stat. 169]

(c) Definitions and special rules.—For purposes of this section—

(1) Applicable payment amount.—The term "applicable payment amount" means, with respect to any month, 1/12 of $2,000.

(2) Applicable large employer.—

(A) In general.— The term "applicable large employer" means, with respect to a calendar year, an employer who employed an average of at least 50 full-time employees on business days during the preceding calendar year.

(B) Exemption for certain employers.—

(i) In general.—An employer shall not be considered to employ more than 50 full-time employees if—

(I) the employer's workforce exceeds 50 full-time employees for 120 days or fewer during the calendar year, and

(II) the employees in excess of 50 employed during such 120-day period were seasonal workers.

(ii) Definition of seasonal workers.— The term "seasonal worker" means a worker who performs labor or services on a seasonal basis as defined by the Secretary of Labor, including workers covered by section 500.20(s)(1) of title 29, Code of Federal Regulations and retail workers employed exclusively during holiday seasons.

(C) Rules for determining employer size.—For purposes of this paragraph—

(i) Application of aggregation rule for employers.— All persons treated as a single employer under subsection (b), (c), (m), or (o) of section 414 of the Internal Revenue Code of 1986 shall be treated as 1 employer.

(ii) Employers not in existence in preceding year.— In the case of an employer which was not in existence throughout the preceding calendar year, the determination of whether such employer is an applicable large employer shall be based on the

average number of employees that it is reasonably expected such employer will employ on business days in the current calendar year.

(iii) Predecessors.—Any reference in this subsection to an employer shall include a reference to any predecessor of such employer.

(D) Application of employer size to assessable penalties—

(i) In general.—The number of individuals employed by an applicable large employer as full-time employees during any month shall be reduced by 30 solely for purposes of calculating—

(I) the assessable payment under subsection (a), or

(II) the overall limitation under subsection (b)(2).

(ii) Aggregation—In the case of persons treated as 1 employer under subparagraph (C)(i), only 1 reduction under subclause (I) or (II) shall be allowed with respect to such persons and such reduction shall be allocated among such persons ratably on the basis of the number of full-time employees employed by each such person.

(E) Full-time equivalents treated as full-time employees.—Solely for purposes of determining whether an employer is an applicable large employer under this paragraph, an employer shall, in addition to the number of full-time employees for any month otherwise determined, include for such month a number of full-time employees determined by dividing the aggregate number of hours of service of employees who are not full-time employees for the month by 120.

(3) Applicable premium tax credit and cost-

sharing reduction.—The term "applicable premium tax credit and cost-sharing reduction" means—

(A) any premium tax credit allowed under section 36B,

(B) any cost-sharing reduction under section 1402 of the Patient Protection and Affordable Care Act, and

(C) any advance payment of such credit or reduction under section 1412 of such Act.

(4) Full-time employee—

(A) In general.—The term "full-time employee" means, with respect to any month, an employee who is employed on average at least 30 hours of service per week.

(B) Hours of service.—The Secretary, in consultation with the Secretary of Labor, shall prescribe such regulations, rules, and guidance as may be necessary to determine the hours of service of an employee, including rules for the application of this paragraph to employees who are not compensated on an hourly basis.

(5) Inflation adjustment.—

(b) In general.—In the case of any calendar year after 2014, each of the dollar amounts in subsection (b) and paragraph (1) shall be increased by an amount equal to the product of—

(i) such dollar amount, and

(ii) the premium adjustment percentage (as defined in section 1302(c)(4) of the Patient Protection and Affordable Care Act) for the calendar year.

(A) Rounding.—If the amount of any increase

under subparagraph (A) is not a multiple of $10, such increase shall be rounded to the next lowest multiple of $10.

(6) Other definitions.—Any term used in this section which is also used in the Patient Protection and Affordable Care Act shall have the same meaning as when used in such Act.

(7) Tax nondeductible.—For denial of deduction for the tax imposed by this section, see section 275(a)(6).

(d) Administration and procedure.—

(1) In general.—Any assessable payment provided by this section shall be paid upon notice and demand by the Secretary, and shall be assessed and collected in the same manner as an assessable penalty under subchapter B of chapter 68.

(2) Time for payment.—The Secretary may provide for the payment of any assessable payment provided by this section on an annual, monthly, or other periodic basis as the Secretary may prescribe.

(3) Coordination with credits, etc.— The Secretary shall prescribe rules, regulations, or guidance for the repayment of any assessable payment (including interest) if such payment is based on the allowance or payment of an applicable premium tax credit or cost- sharing reduction with respect to an employee, such allowance or payment is subsequently disallowed, and the assessable payment would not have been required to be made but for such allowance or payment.

29 U.S.C. §1002(16) provides:

§ 1002. Definitions.

(16)(A) The term "administrator" means--

(i) the person specifically so designated by the terms of the instrument under which the plan is operated;

(ii) if an administrator is not so designated, the plan sponsor; or

(iii) in the case of a plan for which an administrator is not designated and a plan sponsor cannot be identified, such other person as the Secretary may by regulation prescribe.

(B) The term "plan sponsor" means (i) the employer in the case of an employee benefit plan established or maintained by a single employer, (ii) the employee organization in the case of a plan established or maintained by an employee organization, or (iii) in the case of a plan established or maintained by two or more employers or jointly by one or more employers and one or more employee organizations, the association, committee, joint board of trustees, or other similar group of representatives of the parties who establish or maintain the plan.

26 C.F.R. § 54.9815–2713 provides:

§ 54.9815–2713 Coverage of preventive health services.

(1) Services—(1) In general. Beginning at the time described in paragraph (b) of this section and subject to § 54.9815–2713A, a group health plan, or a health insurance issuer offering group health insurance coverage, must provide coverage for all of the following items and services, and may not impose any cost-sharing requirements (such as a copayment, coinsurance, or a deductible) with respect to those items and services:

(i) [Reserved]

(ii) [Reserved]

(iii) [Reserved]

(iv) With respect to women, to the extent not described in paragraph (a)(1)(i) of this section, evidence-informed preventive care and screenings provided for in binding comprehensive health plan coverage guidelines supported by the Health Resources and Services Administration, in accordance with 45 CFR 147.131(a).

(2) Office visits. [Reserved]

(3) Out-of-network providers. [Reserved]

(4) Reasonable medical management. [Reserved]

(5) Services not described. [Reserved]

(b) Timing. [Reserved]

(c) Recommendations not current. [Reserved]

(d) Effective/applicability date. April 16, 2012.

26 C.F.R. § 54.9815–2713A provides:

§ 54.9815–2713A. Accommodations in connection with coverage of preventive health services.

(a) Eligible organizations. An eligible organization is an organization that satisfies all of the following requirements:

(1) The organization opposes providing coverage for some or all of any contraceptive services required to be covered under § 54.9815–2713(a)(1)(iv) on account of religious objections.

(2) The organization is organized and operates as a nonprofit entity.

(3) The organization holds itself out as a religious organization.

(4) The organization self-certifies, in a form and manner specified by the Secretaries of Health and Human Services and Labor, that it satisfies the criteria in paragraphs (a)(1) through (3) of this section, and makes such self-certification available for examination upon request by the first day of the first plan year to which the accommodation in paragraph (b) or (c) of this section applies. The self-certification must be executed by a person authorized to make the certification on behalf of the organization, and must be maintained in a manner consistent with the record retention requirements under section 107 of ERISA.

(b) [Reserved]. For further guidance, see § 54.9815–2713AT(b).

(c) Contraceptive coverage—self-insured group health plans—(1) [Reserved]. For further guidance, see § 54.9815–2713AT(c)(1).

(2) Payments for contraceptive services. (i) [Reserved]. For further guidance, see § 54.9815–2713AT(c)(2)(i) introductory text.

(iii) With respect to payments for contraceptive services, the issuer may not impose any cost-sharing requirements (such as copayment, coinsurance, or a deductible), or impose any premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries. The issuer must segregate premium revenue collected from the eligible organization from the monies used to provide payments for contraceptive services. The issuer must provide payments for contraceptive services in a manner that is consistent with the requirements under sections 2706, 2709, 2711, 2713,

2719, and 2719A of the PHS Act, as incorporated into section 9815. If the group health plan of the eligible organization provides coverage for some but not all of any contraceptive services required to be covered under § 54.9815–2713(a)(1)(iv), the issuer is required to provide payments only for those contraceptive services for which the group health plan does not provide coverage. However, the issuer may provide payments for all contraceptive services, at the issuer's option.

(d) Notice of availability of separate payments for contraceptive services—self-insured and insured group health plans. For each plan year to which the accommodation in paragraph (b) or (c) of this section is to apply, a third party administrator required to provide or arrange payments for contraceptive services pursuant to paragraph (b) of this section, and an issuer required to provide payments for contraceptive services pursuant to paragraph (c) of this section, must provide to plan participants and beneficiaries written notice of the availability of separate payments for contraceptive services contemporaneous with (to the extent possible), but separate from, any application materials distributed in connection with enrollment (or re-enrollment) in group health coverage that is effective beginning on the first day of each applicable plan year. The notice must specify that the eligible organization does not administer or fund contraceptive benefits, but that the third party administrator or issuer, as applicable, provides separate payments for contraceptive services, and must provide contact information for questions and complaints. The following model language, or substantially similar language, may be used to satisfy the notice requirement of this

paragraph (d): "Your employer has certified that your group health plan qualifies for an accommodation with respect to the federal requirement to cover all Food and Drug Administration-approved contraceptive services for women, as prescribed by a health care provider, without cost sharing. This means that your employer will not contract, arrange, pay, or refer for contraceptive coverage. Instead, [name of third party administrator/health insurance issuer] will provide or arrange separate payments for contraceptive services that you use, without cost sharing and at no other cost, for so long as you are enrolled in your group health plan. Your employer will not administer or fund these payments. If you have any questions about this notice, contact [contact information for third party administrator/health insurance issuer]."

(1) Reliance—insured group health plans. (1) If an issuer relies reasonably and in good faith on a representation by the eligible organization as to its eligibility for the accommodation in paragraph (c) of this section, and the representation is later determined to be incorrect, the issuer is considered to comply with any requirement under § 54.9815–2713(a)(1)(iv) to provide contraceptive coverage if the issuer complies with the obligations under this section applicable to such issuer.

(2) A group health plan is considered to comply with any requirement under § 54.9815–2713(a)(1)(iv) to provide contraceptive coverage if the plan complies with its obligations under paragraph (c) of this section, without regard to whether the issuer complies with the obligations under this section applicable to such issuer.

(f) [Reserved]. For further guidance, see § 54.9815-2713AT(f).

26 C.F.R. § 54.9815-2713AT provides:

§ 54.9815-2713AT Accommodations in connection with coverage of preventive health services (temporary).

(a) [Reserved]. For further guidance, see § 54.9815-2713A(a).

(b) Contraceptive coverage--self-insured group health plans. (1) A group health plan established or maintained by an eligible organization that provides benefits on a self-insured basis complies for one or more plan years with any requirement under § 54.9815-2713(a)(1)(iv) to provide contraceptive coverage if all of the requirements of this paragraph (b)(1) are satisfied:

(i) The eligible organization or its plan contracts with one or more third party administrators.

(ii) The eligible organization provides either a copy of the self-certification to each third party administrator or a notice to the Secretary of Health and Human Services that it is an eligible organization and of its religious objection to coverage of all or a subset of contraceptive services.

(A) When a copy of the self-certification is provided directly to a third party administrator, such self- certification must include notice that obligations of the third party administrator are set forth in 29 CFR 2510.3-16 and this section and under § 54.9815-2713A.

(B) When a notice is provided to the Secretary of Health and Human Services, the notice must

include the name of the eligible organization and the basis on which it qualifies for an accommodation; its objection based on sincerely held religious beliefs to coverage of some or all contraceptive services (including an identification of the subset of contraceptive services to which coverage the eligible organization objects, if applicable); the plan name and type (i.e., whether it is a student health insurance plan within the meaning of 45 CFR 147.145(a) or a church plan within the meaning of ERISA section 3(33)); and the name and contact information for any of the plan's third party administrators and health insurance issuers. If there is a change in any of the information required to be included in the notice, the organization must provide updated information to the Secretary of Health and Human Services. The Department of Labor (working with the Department of Health and Human Services), will send a separate notification to each of the plan's third party administrators informing the third party administrator that the Secretary of Health and Human Services has received a notice under paragraph (b)(1)(ii) of this section and describing the obligations of the third party administrator under 29 CFR 2510.3-16 and this section and under § 54.9815-2713A.

(2) If a third party administrator receives a copy of the self-certification from an eligible organization or a notification from the Department of Labor, as described in paragraph (b)(1)(ii) of this section, and agrees to enter into or remain in a contractual relationship with the eligible organization or its plan to provide administrative services for the plan, the third party administrator shall provide or arrange payments for contraceptive services using one of the

following methods--

(i) Provide payments for contraceptive services for plan participants and beneficiaries without imposing any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or imposing a premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries; or

(ii) Arrange for an issuer or other entity to provide payments for contraceptive services for plan participants and beneficiaries without imposing any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or imposing a premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries.

(3) If a third party administrator provides or arranges payments for contraceptive services in accordance with either paragraph (b)(2)(i) or (ii) of this section, the costs of providing or arranging such payments may be reimbursed through an adjustment to the Federally-facilitated Exchange user fee for a participating issuer pursuant to 45 CFR 156.50(d).

(4) A third party administrator may not require any documentation other than a copy of the self- certification from the eligible organization or notification from the Department of Labor described in paragraph (b)(1)(ii) of this section.

(c) Contraceptive coverage--insured group health plans-- (1) General rule. A group health plan established or maintained by an eligible organization that provides benefits through one or more group health insurance issuers complies for one or more

plan years with any requirement under § 54.9815-2713(a)(1)(iv) to provide contraceptive coverage if the eligible organization or group health plan provides either a copy of the self-certification to each issuer providing coverage in connection with the plan or a notice to the Secretary of Health and Human Services that it is an eligible organization and of its religious objection to coverage for all or a subset of contraceptive services.

(i) When a copy of the self-certification is provided directly to an issuer, the issuer has sole responsibility for providing such coverage in accordance with § 54.9815-2713. An issuer may not require any further documentation from the eligible organization regarding its status as such.

(ii) When a notice is provided to the Secretary of Health and Human Services, the notice must include the name of the eligible organization and the basis on which it qualifies for an accommodation; its objection based on its sincerely held religious beliefs to coverage of some or all contraceptive services, as applicable (including an identification of the subset of contraceptive services to which coverage the eligible organization objects, if applicable); the plan name and type (i.e., whether it is a student health insurance plan within the meaning of 45 CFR 147.145(a) or a church plan within the meaning of ERISA section 3(33)); and the name and contact information for any of the plan's third party administrators and health insurance issuers. If there is a change in any of the information required to be included in the notice, the organization must provide updated information to the Secretary of Health and Human Services. The Department of Health and

Human Services will send a separate notification to each of the plan's health insurance issuers informing the issuer that the Secretary of Health and Human Services has received a notice under paragraph (c)(1) of this section and describing the obligations of the issuer under this section and under § 54.9815-2713A.

(2) Payments for contraceptive services.

(i) A group health insurance issuer that receives a copy of the self-certification or notification described in paragraph (b)(1)(ii) of this section with respect to a group health plan established or maintained by an eligible organization in connection with which the issuer would otherwise provide contraceptive coverage under § 54.9815-2713(a)(1)(iv) must—

(ii) [Reserved]. For further guidance, see §54.9815–2713A(c)(2)(ii).

(d) [Reserved]. For further guidance, see §54.9815–2713A(d).

(e) [Reserved]. For further guidance, see §54.9815–2713A(e).

(f) Expiration date. This section expires on August 22, 2017 or on such earlier date as may be provided in final regulations or other action published in the Federal Register.

29 C.F.R. §§ 2510.3-16 provides:

§ 2510.3-16 Definition of "plan administrator."

(a) In general. The term "plan administrator" or "administrator" means the person specifically so designated by the terms of the instrument under which the plan is operated. If an administrator is not so designated, the plan administrator is the plan sponsor, as defined in section 3(16)(B) of ERISA.

(b) In the case of a self-insured group health plan established or maintained by an eligible organization, as defined in § 2590.715-2713A(a) of this chapter, if the eligible organization provides a copy of the self-certification of its objection to administering or funding any contraceptive benefits in accordance with § 2590.715-2713A(b)(1)(ii) of this chapter to a third party administrator, the self-certification shall be an instrument under which the plan is operated, shall be treated as a designation of the third party administrator as the plan administrator under section 3(16) of ERISA for any contraceptive services required to be covered under § 2590.715-2713(a)(1)(iv) of this chapter to which the eligible organization objects on religious grounds, and shall supersede any earlier designation. If, instead, the eligible organization notifies the Secretary of Health and Human Services of its objection to administering or funding any contraceptive benefits in accordance with § 2590.715-2713A(b)(1)(ii) of this chapter, the Department of Labor, working with the Department of Health and Human Services, shall separately provide notification to each third party administrator that such third party administrator shall be the plan administrator under section 3(16) of ERISA for any contraceptive services required to be covered under § 2590.715-2713(a)(1)(iv) of this chapter to which the eligible organization objects on religious grounds, with respect to benefits for contraceptive services that the third party administrator would otherwise manage. Such notification from the Department of Labor shall be an instrument under which the plan is operated and shall supersede any earlier designation.

(c) A third party administrator that becomes a

plan administrator pursuant to this section shall be responsible for--

(1) Complying with section 2713 of the Public Health Service Act (42 U.S.C. 300gg-13) (as incorporated into section 715 of ERISA) and § 2590.715-2713 of this chapter with respect to coverage of contraceptive services. To the extent the plan contracts with different third party administrators for different classifications of benefits (such as prescription drug benefits versus inpatient and outpatient benefits), each third party administrator is responsible for providing contraceptive coverage that complies with section 2713 of the Public Health Service Act (as incorporated into section 715 of ERISA) and § 2590.715-2713 of this chapter with respect to the classification or classifications of benefits subject to its contract.

(2) Establishing and operating a procedure for determining such claims for contraceptive services in accordance with § 2560.503-1 of this chapter.

(3) Complying with disclosure and other requirements applicable to group health plans under Title I of ERISA with respect to such benefits.

29 C.F.R. § 2590.715–2713 provides:

§ 2590.715–2713 Coverage of preventive health services

(a) Services—

(1) In general. Beginning at the time described in paragraph (b) of this section and subject to § 2590.715–2713A, a group health plan, or a health insurance issuer offering group health insurance coverage, must provide coverage for all of the

following items and services, and may not impose any cost-sharing requirements (such as a copayment, coinsurance, or a deductible) with respect to those items and services:

(i) Evidence-based items or services that have in effect a rating of A or B in the current recommendations of the United States Preventive Services Task Force with respect to the individual involved (except as otherwise provided in paragraph (c) of this section);

(ii) Immunizations for routine use in children, adolescents, and adults that have in effect a recommendation from the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention with respect to the individual involved (for this purpose, a recommendation from the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention is considered in effect after it has been adopted by the Director of the Centers for Disease Control and Prevention, and a recommendation is considered to be for routine use if it is listed on the Immunization Schedules of the Centers for Disease Control and Prevention);

(iii) With respect to infants, children, and adolescents, evidence-informed preventive care and screenings provided for in comprehensive guidelines supported by the Health Resources and Services Administration; and

(iv) With respect to women, to the extent not described in paragraph (a)(1)(i) of this section, evidence-informed preventive care and screenings provided for in binding comprehensive health plan coverage guidelines supported by the Health

Resources and Services Administration, in accordance with 45 CFR 147.131(a).

(2) Office visits—

(i) If an item or service described in paragraph (a)(1) of this section is billed separately (or is tracked as individual encounter data separately) from an office visit, then a plan or issuer may impose cost-sharing requirements with respect to the office visit.

(ii) If an item or service described in paragraph (a)(1) of this section is not billed separately (or is not tracked as individual encounter data separately) from an office visit and the primary purpose of the office visit is the delivery of such an item or service, then a plan or issuer may not impose cost-sharing requirements with respect to the office visit.

(iii) If an item or service described in paragraph (a)(1) of this section is not billed separately (or is not tracked as individual encounter data separately) from an office visit and the primary purpose of the office visit is not the delivery of such an item or service, then a plan or issuer may impose cost-sharing requirements with respect to the office visit.

(iv) The rules of this paragraph (a)(2) are illustrated by the following examples:

Example 1.

(i) Facts. An individual covered by a group health plan visits an in-network health care provider. While visiting the provider, the individual is screened for cholesterol abnormalities, which has in effect a rating of A or B in the current recommendations of the United States Preventive Services Task Force with respect to the individual.

The provider bills the plan for an office visit and for the laboratory work of the cholesterol screening test.

(ii) Conclusion. In this Example 1, the plan may not impose any cost-sharing requirements with respect to the separately-billed laboratory work of the cholesterol screening test. Because the office visit is billed separately from the cholesterol screening test, the plan may impose cost-sharing requirements for the office visit.

Example 2.

(i) Facts. Same facts as Example 1. As the result of the screening, the individual is diagnosed with hyperlipidemia and is prescribed a course of treatment that is not included in the recommendations under paragraph (a)(1) of this section.

(ii) Conclusion. In this Example 2, because the treatment is not included in the recommendations under paragraph (a)(1) of this section, the plan is not prohibited from imposing cost-sharing requirements with respect to the treatment.

Example 3.

(i) Facts. An individual covered by a group health plan visits an in-network health care provider to discuss recurring abdominal pain. During the visit, the individual has a blood pressure screening, which has in effect a rating of A or B in the current recommendations of the United States Preventive Services Task Force with respect to the individual. The provider bills the plan for an office visit.

(ii) Conclusion. In this Example 3, the blood pressure screening is provided as part of an office

visit for which the primary purpose was not to deliver items or services described in paragraph (a)(1) of this section. Therefore, the plan may impose a cost-sharing requirement for the office visit charge.

Example 4.

(i) Facts. A child covered by a group health plan visits an in-network pediatrician to receive an annual physical exam described as part of the comprehensive guidelines supported by the Health Resources and Services Administration. During the office visit, the child receives additional items and services that are not described in the comprehensive guidelines supported by the Health Resources and Services Administration, nor otherwise described in paragraph (a)(1) of this section. The provider bills the plan for an office visit.

(ii) Conclusion. In this Example 4, the service was not billed as a separate charge and was billed as part of an office visit. Moreover, the primary purpose for the visit was to deliver items and services described as part of the comprehensive guidelines supported by the Health Resources and Services Administration. Therefore, the plan may not impose a cost-sharing requirement with respect to the office visit.

(3) Out-of-network providers. Nothing in this section requires a plan or issuer that has a network of providers to provide benefits for items or services described in paragraph (a)(1) of this section that are delivered by an out-of-network provider. Moreover, nothing in this section precludes a plan or issuer that has a network of providers from imposing cost-sharing requirements for items or services described in paragraph (a)(1) of this section that are delivered

by an out-of-network provider.

(4) Reasonable medical management. Nothing prevents a plan or issuer from using reasonable medical management techniques to determine the frequency, method, treatment, or setting for an item or service described in paragraph (a)(1) of this section to the extent not specified in the recommendation or guideline.

(5) Services not described. Nothing in this section prohibits a plan or issuer from providing coverage for items and services in addition to those recommended by the United States Preventive Services Task Force or the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention, or provided for by guidelines supported by the Health Resources and Services Administration, or from denying coverage for items and services that are not recommended by that task force or that advisory committee, or under those guidelines. A plan or issuer may impose cost-sharing requirements for a treatment not described in paragraph (a)(1) of this section, even if the treatment results from an item or service described in paragraph (a)(1) of this section.

(b) Timing—

(1) In general. A plan or issuer must provide coverage pursuant to paragraph (a)(1) of this section for plan years that begin on or after September 23, 2010, or, if later, for plan years that begin on or after the date that is one year after the date the recommendation or guideline is issued.

(2) Changes in recommendations or guidelines. A plan or issuer is not required under this section to provide coverage for any items and services specified

in any recommendation or guideline described in paragraph (a)(1) of this section after the recommendation or guideline is no longer described in paragraph (a)(1) of this section. Other requirements of Federal or State law may apply in connection with a plan or issuer ceasing to provide coverage for any such items or services, including PHS Act section 2715(d)(4), which requires a plan or issuer to give 60 days advance notice to an enrollee before any material modification will become effective.

(c) Recommendations not current. For purposes of paragraph (a)(1)(i) of this section, and for purposes of any other provision of law, recommendations of the United States Preventive Services Task Force regarding breast cancer screening, mammography, and prevention issued in or around November 2009 are not considered to be current.

(d) Applicability date. The provisions of this section apply for plan years beginning on or after September 23, 2010. See § 2590.715–1251 of this Part for determining the application of this section to grandfathered health plans (providing that these rules regarding coverage of preventive health services do not apply to grandfathered health plans).

29 C.F.R. § 2590.715-2713A provides:

§ 2590.715-2713A. Accommodations in connection with coverage of preventive health services

(a) Eligible organizations. An eligible organization is an organization that satisfies all of the following requirements:

(1) The organization opposes providing coverage for some or all of any contraceptive services required to be covered under § 2590.715-2713(a)(1)(iv) on account of religious objections.

(2) The organization is organized and operates as a nonprofit entity.

(3) The organization holds itself out as a religious organization.

(4) The organization self-certifies, in a form and manner specified by the Secretary, that it satisfies the criteria in paragraphs (a)(1) through (3) of this section, and makes such self-certification available for examination upon request by the first day of the first plan year to which the accommodation in paragraph (b) or (c) of this section applies. The self- certification must be executed by a person authorized to make the certification on behalf of the organization, and must be maintained in a manner consistent with the record retention requirements under section 107 of ERISA.

(b) Contraceptive coverage--self-insured group health plans—

(1) A group health plan established or maintained by an eligible organization that provides benefits on a self-insured basis complies for one or more plan years with any requirement under § 2590.715-2713(a)(1)(iv) to provide contraceptive coverage if all of the requirements of this paragraph (b)(1) are satisfied:

(i) The eligible organization or its plan contracts with one or more third party administrators.

(ii) The eligible organization provides either a copy of the self-certification to each third party administrator or a notice to the Secretary of Health and Human Services that it is an eligible organization and of its religious objection to coverage of all or a subset of contraceptive services.

(A) When a copy of the self-certification is provided directly to a third party administrator, such self- certification must include notice that obligations of the third party administrator are set forth in

§ 2510.3-16 of this chapter and this section.

(B) When a notice is provided to the Secretary of Health and Human Services, the notice must include the name of the eligible organization and the basis on which it qualifies for an accommodation; its objection based on sincerely held religious beliefs to coverage of some or all contraceptive services (including an identification of the subset of contraceptive services to which coverage the eligible organization objects, if applicable); the plan name and type (i.e., whether it is a student health insurance plan within the meaning of 45 CFR 147.145(a) or a church plan within the meaning of ERISA section 3(33)); and the name and contact information for any of the plan's third party administrators and health insurance issuers. If there is a change in any of the information required to be included in the notice, the organization must provide updated information to the Secretary of Health and Human Services. The Department of Labor (working with the Department of Health and Human Services), shall send a separate notification to each of the plan's third party administrators informing the third party administrator that the

Secretary of Health and Human Services has received a notice under paragraph (b)(1)(ii) of this section and describing the obligations of the third party administrator under § 2510.3-16 of this chapter and this section.

(2) If a third party administrator receives a copy of the self-certification from an eligible organization or a notification from the Department of Labor, as described in paragraph (b)(1)(ii) of this section, and agrees to enter into or remain in a contractual relationship with the eligible organization or its plan to provide administrative services for the plan, the third party administrator shall provide or arrange payments for contraceptive services using one of the following methods--

(i) Provide payments for contraceptive services for plan participants and beneficiaries without imposing any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or imposing a premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries; or

(ii) Arrange for an issuer or other entity to provide payments for contraceptive services for plan participants and beneficiaries without imposing any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or imposing a premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries.

(3) If a third party administrator provides or arranges payments for contraceptive services in accordance with either paragraph (b)(2)(i) or (ii) of

this section, the costs of providing or arranging such payments may be reimbursed through an adjustment to the Federally-facilitated Exchange user fee for a participating issuer pursuant to 45 CFR 156.50(d).

(4) A third party administrator may not require any documentation other than a copy of the self- certification from the eligible organization or notification from the Department of Labor described in paragraph (b)(1)(ii) of this section.

(c) Contraceptive coverage--insured group health plans –

(1) General rule. A group health plan established or maintained by an eligible organization that provides benefits through one or more group health insurance issuers complies for one or more plan years with any requirement under § 2590.715-2713(a)(1)(iv) to provide contraceptive coverage if the eligible organization or group health plan provides either a copy of the self-certification to each issuer providing coverage in connection with the plan or a notice to the Secretary of Health and Human Services that it is an eligible organization and of its religious objection to coverage for all or a subset of contraceptive services.

(i) When a copy of the self-certification is provided directly to an issuer, the issuer has sole responsibility for providing such coverage in accordance with

§ 2590.715-2713. An issuer may not require any further documentation from the eligible organization regarding its status as such.

(ii) When a notice is provided to the Secretary of Health and Human Services, the notice must include the name of the eligible organization and the

basis on which it qualifies for an accommodation; its objection based on its sincerely held religious beliefs to coverage of some or all contraceptive services, as applicable (including an identification of the subset of contraceptive services to which coverage the eligible organization objects, if applicable); the plan name and type (i.e., whether it is a student health insurance plan within the meaning of 45 CFR 147.145(a) or a church plan within the meaning of ERISA section 3(33)); and the name and contact information for any of the plan's third party administrators and health insurance issuers. If there is a change in any of the information required to be included in the notice, the organization must provide updated information to the Secretary of Health and Human Services. The Department of Health and Human Services will send a separate notification to each of the plan's health insurance issuers informing the issuer that the Secretary of Health and Human Services has received a notice under paragraph (c)(1) of this section and describing the obligations of the issuer under this section.

(2) Payments for contraceptive services --(i) A group health insurance issuer that receives a copy of the self-certification or notification described in paragraph (c)(1)(ii) of this section with respect to a group health plan established or maintained by an eligible organization in connection with which the issuer would otherwise provide contraceptive coverage under § 2590.715-2713(a)(1)(iv) must--

(A) Expressly exclude contraceptive coverage from the group health insurance coverage provided in connection with the group health plan; and

(B) Provide separate payments for any

contraceptive services required to be covered under § 2590.715-2713(a)(1)(iv) for plan participants and beneficiaries for so long as they remain enrolled in the plan.

(ii) With respect to payments for contraceptive services, the issuer may not impose any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or impose any premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries. The issuer must segregate premium revenue collected from the eligible organization from the monies used to provide payments for contraceptive services. The issuer must provide payments for contraceptive services in a manner that is consistent with the requirements under sections 2706, 2709, 2711, 2713, 2719, and 2719A of the PHS Act, as incorporated into section 715 of ERISA. If the group health plan of the eligible organization provides coverage for some but not all of any contraceptive services required to be covered under § 2590.715-2713(a)(1)(iv), the issuer is required to provide payments only for those contraceptive services for which the group health plan does not provide coverage. However, the issuer may provide payments for all contraceptive services, at the issuer's option.

(d) Notice of availability of separate payments for contraceptive services--self-insured and insured group health plans. For each plan year to which the accommodation in paragraph (b) or (c) of this section is to apply, a third party administrator required to provide or arrange payments for contraceptive services pursuant to paragraph (b) of this section, and an issuer required to provide payments for

contraceptive services pursuant to paragraph (c) of this section, must provide to plan participants and beneficiaries written notice of the availability of separate payments for contraceptive services contemporaneous with (to the extent possible), but separate from, any application materials distributed in connection with enrollment (or re-enrollment) in group health coverage that is effective beginning on the first day of each applicable plan year. The notice must specify that the eligible organization does not administer or fund contraceptive benefits, but that the third party administrator or issuer, as applicable, provides separate payments for contraceptive services, and must provide contact information for questions and complaints. The following model language, or substantially similar language, may be used to satisfy the notice requirement of this paragraph (d): "Your employer has certified that your group health plan qualifies for an accommodation with respect to the federal requirement to cover all Food and Drug Administration-approved contraceptive services for women, as prescribed by a health care provider, without cost sharing. This means that your employer will not contract, arrange, pay, or refer for contraceptive coverage. Instead, [name of third party administrator/health insurance issuer] will provide or arrange separate payments for contraceptive services that you use, without cost sharing and at no other cost, for so long as you are enrolled in your group health plan. Your employer will not administer or fund these payments. If you have any questions about this notice, contact [contact information for third party administrator/health insurance issuer]."

(e) Reliance--insured group health plans –

(1) If an issuer relies reasonably and in good faith on a representation by the eligible organization as to its eligibility for the accommodation in paragraph (c) of this section, and the representation is later determined to be incorrect, the issuer is considered to comply with any requirement under § 2590.715-2713(a)(1)(iv) to provide contraceptive coverage if the issuer complies with the obligations under this section applicable to such issuer.

(2) A group health plan is considered to comply with any requirement under § 2590.715-2713(a)(1)(iv) to provide contraceptive coverage if the plan complies with its obligations under paragraph (c) of this section, without regard to whether the issuer complies with the obligations under this section applicable to such issuer.

45 C.F.R. § 147.130 provides:

§ 147.130 Coverage of preventive health services. (a) Services—

(1) In general. Beginning at the time described in paragraph (b) of this section and subject to § 147.131, a group health plan, or a health insurance issuer offering group or individual health insurance coverage, must provide coverage for all of the following items and services, and may not impose any cost-sharing requirements (such as a copayment, coinsurance, or a deductible) with respect to those items and services:

(i) Evidence-based items or services that have in effect a rating of A or B in the current recommendations of the United States Preventive Services Task Force with respect to the individual involved (except as otherwise provided in paragraph

(c) of this section);

(ii) Immunizations for routine use in children, adolescents, and adults that have in effect a recommendation from the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention with respect to the individual involved (for this purpose, a recommendation from the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention is considered in effect after it has been adopted by the Director of the Centers for Disease Control and Prevention, and a recommendation is considered to be for routine use if it is listed on the Immunization Schedules of the Centers for Disease Control and Prevention);

(iii) With respect to infants, children, and adolescents, evidence-informed preventive care and screenings provided for in comprehensive guidelines supported by the Health Resources and Services Administration; and

(iv) With respect to women, to the extent not described in paragraph (a)(1)(i) of this section, evidence-informed preventive care and screenings provided for in binding comprehensive health plan coverage guidelines supported by the Health Resources and Services Administration.

(2) Office visits—

(i) If an item or service described in paragraph (a)(1) of this section is billed separately (or is tracked as individual encounter data separately) from an office visit, then a plan or issuer may impose cost-sharing requirements with respect to the office visit.

(ii) If an item or service described in

paragraph (a)(1) of this section is not billed separately (or is not tracked as individual encounter data separately) from an office visit and the primary purpose of the office visit is the delivery of such an item or service, then a plan or issuer may not impose cost-sharing requirements with respect to the office visit.

(iii) If an item or service described in paragraph (a)(1) of this section is not billed separately (or is not tracked as individual encounter data separately) from an office visit and the primary purpose of the office visit is not the delivery of such an item or service, then a plan or issuer may impose cost-sharing requirements with respect to the office visit.

(iv) The rules of this paragraph (a)(2) are illustrated by the following examples:

Example 1. (i) Facts. An individual covered by a group health plan visits an in-network health care provider. While visiting the provider, the individual is screened for cholesterol abnormalities, which has in effect a rating of A or B in the current recommendations of the United States Preventive Services Task Force with respect to the individual. The provider bills the plan for an office visit and for the laboratory work of the cholesterol screening test.

(ii) Conclusion. In this Example 1, the plan may not impose any cost-sharing requirements with respect to the separately-billed laboratory work of the cholesterol screening test. Because the office visit is billed separately from the cholesterol screening test, the plan may impose cost-sharing requirements for the office visit.

Example 2.

(i) Facts. Same facts as Example 1. As the result of the screening, the individual is diagnosed with hyperlipidemia and is prescribed a course of treatment that is not included in the recommendations under paragraph (a)(1) of this section.

(ii) Conclusion. In this Example 2, because the treatment is not included in the recommendations under paragraph (a)(1) of this section, the plan is not prohibited from imposing cost-sharing requirements with respect to the treatment.

Example 3.

(i) Facts. An individual covered by a group health plan visits an in-network health care provider to discuss recurring abdominal pain. During the visit, the individual has a blood pressure screening, which has in effect a rating of A or B in the current recommendations of the United States Preventive Services Task Force with respect to the individual. The provider bills the plan for an office visit.

(ii) Conclusion. In this Example 3, the blood pressure screening is provided as part of an office visit for which the primary purpose was not to deliver items or services described in paragraph (a)(1) of this section. Therefore, the plan may impose a cost-sharing requirement for the office visit charge.

Example 4.

(i) Facts. A child covered by a group health plan visits an in-network pediatrician to receive an annual physical exam described as part of the comprehensive guidelines supported by the Health Resources and Services Administration. During the

office visit, the child receives additional items and services that are not described in the comprehensive guidelines supported by the Health Resources and Services Administration, nor otherwise described in paragraph (a)(1) of this section. The provider bills the plan for an office visit.

(ii) Conclusion. In this Example 4, the service was not billed as a separate charge and was billed as part of an office visit. Moreover, the primary purpose for the visit was to deliver items and services described as part of the comprehensive guidelines supported by the Health Resources and Services Administration. Therefore, the plan may not impose a cost-sharing requirement for the office visit charge.

(3) Out-of-network providers. Nothing in this section requires a plan or issuer that has a network of providers to provide benefits for items or services described in paragraph (a)(1) of this section that are delivered by an out-of-network provider. Moreover, nothing in this section precludes a plan or issuer that has a network of providers from imposing cost-sharing requirements for items or services described in paragraph (a)(1) of this section that are delivered by an out-of-network provider.

(4) Reasonable medical management. Nothing prevents a plan or issuer from using reasonable medical management techniques to determine the frequency, method, treatment, or setting for an item or service described in paragraph (a)(1) of this section to the extent not specified in the recommendation or guideline.

(5) Services not described. Nothing in this section prohibits a plan or issuer from providing coverage for

items and services in addition to those recommended by the United States Preventive Services Task Force or the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention, or provided for by guidelines supported by the Health Resources and Services Administration, or from denying coverage for items and services that are not recommended by that task force or that advisory committee, or under those guidelines. A plan or issuer may impose cost-sharing requirements for a treatment not described in paragraph (a)(1) of this section, even if the treatment results from an item or service described in paragraph (a)(1) of this section.

(b) Timing—

(1) In general. A plan or issuer must provide coverage pursuant to paragraph (a)(1) of this section for plan years (in the individual market, policy years) that begin on or after September 23, 2010, or, if later, for plan years (in the individual market, policy years) that begin on or after the date that is one year after the date the recommendation or guideline is issued.

(2) Changes in recommendations or guidelines. A plan or issuer is not required under this section to provide coverage for any items and services specified in any recommendation or guideline described in paragraph (a)(1) of this section after the recommendation or guideline is no longer described in paragraph (a)(1) of this section. Other requirements of Federal or State law may apply in connection with a plan or issuer ceasing to provide coverage for any such items or services, including PHS Act section 2715(d)(4), which requires a plan or issuer to give 60 days advance notice to an enrollee

before any material modification will become effective.

(c) Recommendations not current. For purposes of paragraph (a)(1)(i) of this section, and for purposes of any other provision of law, recommendations of the United States Preventive Services Task Force regarding breast cancer screening, mammography, and prevention issued in or around November 2009 are not considered to be current.

(d) Applicability date. The provisions of this section apply for plan years (in the individual market, for policy years) beginning on or after September 23, 2010. See § 147.140 of this Part for determining the application of this section to grandfathered health plans (providing that these rules regarding coverage of preventive health services do not apply to grandfathered health plans).

45 C.F.R. § 147.131 provides:

§ 147.131 Exemption and accommodations in connection with coverage of preventive health services.

(a) Religious employers. In issuing guidelines under § 147.130(a)(1)(iv), the Health Resources and Services Administration may establish an exemption from such guidelines with respect to a group health plan established or maintained by a religious employer (and health insurance coverage provided in connection with a group health plan established or maintained by a religious employer) with respect to any requirement to cover contraceptive services under such guidelines. For purposes of this paragraph (a), a "religious employer" is an organization that is organized and operates as a

nonprofit entity and is referred to in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended.

(b) Eligible organizations. An eligible organization is an organization that satisfies all of the following requirements:

(1) The organization opposes providing coverage for some or all of any contraceptive services required to be covered under § 147.130(a)(1)(iv) on account of religious objections.

(2) The organization is organized and operates as a nonprofit entity.

(3) The organization holds itself out as a religious organization.

(4) The organization self-certifies, in a form and manner specified by the Secretary, that it satisfies the criteria in paragraphs (b)(1) through (3) of this section, and makes such self-certification available for examination upon request by the first day of the first plan year to which the accommodation in paragraph (c) of this section applies. The self- certification must be executed by a person authorized to make the certification on behalf of the organization, and must be maintained in a manner consistent with the record retention requirements under section 107 of the Employee Retirement Income Security Act of 1974.

(c) Contraceptive coverage—insured group health plans—

(1) General rule. A group health plan established or maintained by an eligible organization that provides benefits through one or more group health insurance issuers complies for one or more plan years

with any requirement under § 147.130(a)(1)(iv) to provide contraceptive coverage if the eligible organization or group health plan provides either a copy of the self-certification to each issuer providing coverage in connection with the plan or a notice to the Secretary of Health and Human Services that it is an eligible organization and of its religious objection to coverage for all or a subset of contraceptive services.

(i) When a self-certification is provided directly to an issuer, the issuer has sole responsibility for providing such coverage in accordance with § 147.130. An issuer may not require any further documentation from the eligible organization regarding its status as such.

(ii) When a notice is provided to the Secretary of Health and Human Services, the notice must include the name of the eligible organization and the basis on which it qualifies for an accommodation; its objection based on its sincerely held religious beliefs to coverage of some or all contraceptive services, as applicable (including an identification of the subset of contraceptive services to which coverage the eligible organization objects, if applicable); the plan name and type (i.e., whether it is a student health insurance plan within the meaning of § 147.145(a) or a church plan within the meaning of ERISA section 3(33)); and the name and contact information for any of the plan's third party administrators and health insurance issuers. If there is a change in any of the information required to be included in the notice, the organization must provide updated information to the Secretary of Health and Human Services. The Department of

Health and Human Services will send a separate notification to each of the plan's health insurance issuers informing the issuer that the Secretary of Health and Human Services has received a notice under paragraph (c)(1) of this section and describing the obligations of the issuer under this section.

(2) Payments for contraceptive services—

(i) A group health insurance issuer that receives a copy of the self-certification or notification described in paragraph (c)(1)(ii) of this section with respect to a group health plan established or maintained by an eligible organization in connection with which the issuer would otherwise provide contraceptive coverage under § 147.130(a)(1)(iv) must--

(A) Expressly exclude contraceptive coverage from the group health insurance coverage provided in connection with the group health plan; and

(B) Provide separate payments for any contraceptive services required to be covered under § 147.130(a)(1)(iv) for plan participants and beneficiaries for so long as they remain enrolled in the plan.

(ii) With respect to payments for contraceptive services, the issuer may not impose any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or impose any premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries. The issuer must segregate premium revenue collected from the eligible organization from the monies used to provide payments for contraceptive services. The issuer must

provide payments for contraceptive services in a manner that is consistent with the requirements under sections 2706, 2709, 2711, 2713, 2719, and 2719A of the PHS Act. If the group health plan of the eligible organization provides coverage for some but not all of any contraceptive services required to be covered under § 147.130(a)(1)(iv), the issuer is required to provide payments only for those contraceptive services for which the group health plan does not provide coverage. However, the issuer may provide payments for all contraceptive services, at the issuer's option.

(d) Notice of availability of separate payments for contraceptive services--insured group health plans and student health insurance coverage. For each plan year to which the accommodation in paragraph (c) of this section is to apply, an issuer required to provide payments for contraceptive services pursuant to paragraph (c) of this section must provide to plan participants and beneficiaries written notice of the availability of separate payments for contraceptive services contemporaneous with (to the extent possible), but separate from, any application materials distributed in connection with enrollment (or re-enrollment) in group health coverage that is effective beginning on the first day of each applicable plan year. The notice must specify that the eligible organization does not administer or fund contraceptive benefits, but that the issuer provides separate payments for contraceptive services, and must provide contact information for questions and complaints. The following model language, or substantially similar language, may be used to satisfy the notice requirement of this paragraph (d): "Your [employer/institution of higher education] has

certified that your [group health plan/student health insurance coverage] qualifies for an accommodation with respect to the federal requirement to cover all Food and Drug Administration-approved contraceptive services for women, as prescribed by a health care provider, without cost sharing. This means that your [employer/institution of higher education] will not contract, arrange, pay, or refer for contraceptive coverage. Instead, [name of health insurance issuer] will provide separate payments for contraceptive services that you use, without cost sharing and at no other cost, for so long as you are enrolled in your [group health plan/student health insurance coverage]. Your [employer/institution of higher education] will not administer or fund these payments. If you have any questions about this notice, contact [contact information for health insurance issuer]."

(e) Reliance –

(1) If an issuer relies reasonably and in good faith on a representation by the eligible organization as to its eligibility for the accommodation in paragraph (c) of this section, and the representation is later determined to be incorrect, the issuer is considered to comply with any requirement under § 147.130(a)(1)(iv) to provide contraceptive coverage if the issuer complies with the obligations under this section applicable to such issuer.

(2) A group health plan is considered to comply with any requirement under § 147.130(a)(1)(iv) to provide contraceptive coverage if the plan complies with its obligations under paragraph (c) of this section, without regard to whether the issuer complies with the obligations

under this section applicable to such issuer.

(f) Application to student health insurance coverage. The provisions of this section apply to student health insurance coverage arranged by an eligible organization that is an institution of higher education in a manner comparable to that in which they apply to group health insurance coverage provided in connection with a group health plan established or maintained by an eligible organization that is an employer. In applying this section in the case of student health insurance coverage, a reference to "plan participants and beneficiaries" is a reference to student enrollees and their covered dependents.

APPENDIX E

EBSA FORM 700– CERTIFICATION

(revised August 2014)

This form may be used to certify that the health coverage established or maintained or arranged by the organization listed below qualifies for an accommodation with respect to the federal requirement to cover certain contraceptive services without cost sharing, pursuant to 26 CFR 54.9815-2713A, 29 CFR 2590.715-2713A, and 45 CFR 147.131. Alternatively, an eligible organization may also provide notice to the Secretary of Health and Human Services.

Please fill out this form completely. This form should be made available for examination upon request and maintained on file for at least 6 years following the end of the last applicable plan year.

Name of the objecting organization	
Name and title of the individual who is authorized to make, and makes, this	

certification on behalf of the organization	
Mailing and email addresses and phone number for the individual listed above	

I certify the organization is an eligible organization (as described in 26 CFR 54.9815-2713A(a), 29 CFR 2590.715-2713A(a); 45 CFR 147.131(b)) that has a religious objection to providing coverage for some or all of any contraceptive services that would otherwise be required to be covered.

Note: An organization that offers coverage through the same group health plan as a religious employer (as defined in 45 CFR 147.131(a)) and/or an eligible organization (as defined in 26 CFR 54.9815-2713A(a); 29 CFR 2590.715-2713A(a); 45 CFR 147.131(b)), and that is part of the same controlled group of corporations as, or under common control with, such employer and/or organization (within the meaning of section 52(a) or (b) of the Internal Revenue Code), is considered to meet the requirements of 26 CFR 54.9815-2713A(a)(3), 29 CFR 2590.715-2713A(a)(3), and 45 CFR 147.131(b)(3).

I declare that I have made this certification, and that, to the best of my knowledge and belief, it is true and

correct. I also declare that this certification is complete.

_____

Signature of the individual listed above

_____

Date

The organization or its plan using this form must provide a copy of this certification to the plan's health insurance issuer (for insured health plans) or a third party administrator (for self-insured health plans) in order for the plan to be accommodated with respect to the contraceptive coverage requirement.

Notice to Third Party Administrators of Self-Insured Health Plans

In the case of a group health plan that provides benefits on a self-insured basis, the provision of this certification to a third party administrator for the plan that will process claims for contraceptive coverage required under 26 CFR 54.9815-2713(a)(1)(iv) or 29 CFR 2590.715-2713(a)(1)(iv) constitutes notice to the third party administrator that the eligible organization:

(1) Will not act as the plan administrator or claims administrator with respect to claims for contraceptive services, or contribute to the funding of contraceptive services; and

(2) The obligations of the third party administrator are set forth in 26 CFR 54.9815-2713A, 29 CFR 2510.3-16, and 29 CFR

2590.715-2713A.

As an alternative to using this form, an eligible organization may provide notice to the Secretary of Health and Human Services that the eligible organization has a religious objection to providing coverage for all or a subset of contraceptive services, pursuant to 26 CFR 54.9815-2713A(b)(1)(ii)(B) and (c)(1)(ii), 29 CFR 2590.715-2713A(b)(1)(ii)(B) and (c)(1)(ii), and 45 CFR 147.131(c)(1)(ii). A model notice is available at:

http://www.cms.gov/cciio/resources/Regulations-and-Guidance/index.html#Prevention.

This form or a notice to the Secretary is an instrument under which the plan is operated.

PRA Disclosure Statement

According to the Paperwork Reduction Act of 1995, no persons are required to respond to a collection of information unless it displays a valid OMB control number. The valid OMB control number for this information collection is 1210-0150. An organization that seeks to be recognized as an eligible organization that qualifies for an accommodation with respect to the federal requirement to cover certain contraceptive services without cost sharing may complete this self-certification form, or provide notice to the Secretary of Health and Human Services, in order to obtain or retain the benefit of the exemption from covering certain contraceptive services. The self-certification form or notice to the Secretary of Health and Human Services must be maintained in a manner consistent with the record

retention requirements under section 107 of the Employee Retirement Income Security Act of 1974, which generally requires records to be retained for six years. The time required to complete this information collection is estimated to average 50 minutes per response, including the time to review instructions, gather the necessary data, and complete and review the information collection. If you have comments concerning the accuracy of the time estimate(s) or suggestions for improving this form, please write to: U.S. Department of Labor, Employee Benefits Security Administration, Office of Policy and Research, 200 Constitution Avenue, N.W., Room N-5718, Washington, DC 20210 or email ebsa.opr@dol.gov and reference the OMB Control Number 1210-0150.